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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Petition of Time Warner Cable Akron, OH, *et al.* CSR-4112-A

For Modification of ADI
Station WQHS, Cleveland, OH

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1995; Released: July 24, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Before the Commission is a petition for special relief filed by Time Warner Cable ("Time Warner" or "operator") seeking to modify the Cleveland, Ohio "area of dominant influence" ("ADI") and to exclude 34 communities served by Time Warner from WQHS's television market.[1] Silver King Broadcasting of Cleveland, Inc. ("Silver King"), licensee of television station WQHS-TV (Channel 61), Cleveland, Ohio, filed an opposition to the petition to which Time Warner replied. Silver King also filed a motion for expedited and consolidated action, which Time Warner opposed, along with a reply to the opposition. Time Warner then filed a motion to strike the reply to opposition filed by Silver King.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its Report and Order in MM Docket 92-259,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market tobetter effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

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[1] The particular Ohio communities affected by this petition include Akron (OH 0006); Barberton (OH 0217); Cuyahoga Falls (OH 0218); Stow (OH 0243); Tallmadge (OH 0242); Fairlawn (OH 0242); Mogadore (OH 9773); Lakemore (OH 0529); Munroe Falls (OH 0772); Norton (OH 0771); Springfield (OH 0947); Doylestown (OH 0787); Silver lake (OH 0898); Wadsworth (OH 1003); Wadsworth Township (OH 2249); Louisville (OH 0063); North Canton (OH 0106); Canton (OH 0062); East Canton (OH 0351); Mineral City (OH 0349); Malvern Village (OH 0348); Waynesburg (OH 0350); Magnolia Village (OH 0346); East Sparta (OH 0347); Alliance (OH 0763); Lexington Township (OH 0789); Meyers Lake Village (OH 0528); Perry Township (OH 1010); Jackson Township (OH 1009); Plain Township (OH 0065); Nimishillen Township (OH 0429); Hartville (OH 0788); Lake Township (OH 1308); and Limaville Village (OH 2271) (collectively known as the "communities").

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e. g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headed of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headed of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. In its petition for special relief, Time Warner requests that WQHS's ADI be modified so that Time Warner's cable systems serving Akron, Canton, and surrounding communities, are not required to carry the station's signal. The operator states that mandatory carriage of WQHS will force it to make consumer unfriendly changes by changing the trapping configuration of the basic tier line-up and dropping a service from the satellite programming tier. Time Warner asks that the Commission to relieve it "from any obligation to carry" WQHS because the station does not provide local coverage to the communities in question and fails to satisfy any of the four market factors set forth in the 1992 Cable Act and the Commission's rules.

9. With regard to the historical carriage factor, the operator asserts that WQHS has never been carried on the systems. Time Warner does admit, however, that it did carry WCLQ, which was the station's former call-sign before adopting a home shopping format, up until 1986. The operator then states that the system would have voluntarily carried WQHS if its subscribers so demanded. Time Warner maintains that "WQHS is the only commercial television station in the Cleveland ADI which is not carried on the Systems." Second, petitioner alleges that WQHS does not provide local service to the relevant communities. Specifically, WQHS broadcasts home shopping programming that does not focus on interests and issues involving the Cleveland area. Time Warner adds that the non-shopping programs the station does air, such as the program "IN YOUR INTEREST", are short segment "fillers" found between sales presentations or are programs broadcast primarily on Sunday mornings when viewing is at a minimum. In addition, these programs are nationally syndicated and neglect local news and sports programming of importance to the community.[11] The operator also notes that WQHS is not physically proximate to many communities

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[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[7] 8 FCC Rcd at 2977 (emphasis in original).
[8] *Id.* and n.139.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.
[11] Time Warner asserts that a majority of WQHS's long-length programming is not locally originated but rather consists of nationally syndicated children's programming and religious pro-

served by the cable system; in this regard, Time Warner asserts that the 35 mile zone around Cleveland, Ohio does not cover many of the referenced cable communities.[12] Moreover, the station's predicted Grade B contour does not cover the portions of the Canton system serving the communities of Malvern, East Sparta, Magnolia, and Mineral City. Referring to the third factor, Time Warner states that 11 Cleveland area ADI stations, which are carried on all of the cable systems, provide extensive local news and sports coverage throughout each programming day.[13] Time Warner also mentions that it meets local community concerns through its carriage of educational and public access channels. Finally, the operator alleges that WQHS has insignificant viewing in the area even though it has been in operation for over twelve years. Time Warner asserts that the February 1992 Nielsen Report indicates that WQHS did not have a sufficient audience to be rated or considered to have a single share in eight of the nine daypart categories for Cleveland, OH.

10. In opposition, Silver King first asserts that Time Warner is abusing the Commission's processes by "pursuing piecemeal destruction of home shopping stations' must carry rights through petitions which seek to evade its obligation to carry individual home shopping stations."[14] Silver King argues that the motivation behind these petitions is to eliminate any competition that may affect Time Warner's own cable home shopping service. Silver King also believes that Time Warner has impermissibly singled the station out for different treatment from all other Cleveland area stations by purposefully avoiding compliance with the 1992 Cable Act's must carry objectives vis-a-vis WQHS.

11. With regard to past cable carriage, Silver King argues that this factor is not controlling in market deletion cases because the 1992 Cable Act would have accomplished nothing more than maintaining the *status quo* with respect to weaker stations which cable systems had previously declined to carry. To rebut Time Warner's lack of public interest programming claim, Silver King notes that broadcasts specialized commercial-free children's fare and locally oriented religious programming during certain dayparts. Moreover, Silver King states that the Commission has found that home shopping generally serves the public interest and Time Warner's objections do not support a change in this conclusion. Silver King also asserts that the operator fails to: (1) demonstrate that programs are worthy of Commission consideration only if they are half-hour programs; (2) submit any information which suggests that WQHS does not address a particular significant community issue or has otherwise abused its discretion; and (3) provide any support for its suggestion that stations' public service programming may be considered for purposes of mandatory carriage qualification only if the station promotes or produces it. On this last point, Silver King notes that other Cleveland ADI stations whose programming Time Warner praises also carry large amounts of network and syndicated non-local programming. Silver King also asserts that the physical distance between the WQHS and the cable communities is not determinative because, if this were a controlling factor, Time Warner would not be required to carry any Cleveland market station more than 35 miles away. With regard to Time Warner's Grade B argument, Silver King argues that this claim is irrelevant because carriage rights depend on ADIs rather than service contour locations. Moreover, the Grade B contours of Cleveland ADI television stations WBNX, WOIO, and WUAB, also do not cover certain Time Warner cable communities yet the systems continue to carry those stations. As for other stations serving Cleveland, Silver King maintains that WQHS is carrying more public service programs than at least two other independent UHF commercial stations in the Cleveland market yet Time Warner is apparently carrying those stations. With respect to viewership, Silver King asserts that it would be contrary to First Amendment principles to base must carry rights on the popularity of particular stations as Time Warner would like the Commission to do. It also notes that Time Warner does not submit necessary data showing that WQHS is not viewed in the cable communities. Silver King concludes by asking the Commission to deny Time Warner's petition and order the operator to commence carriage of WQHS within 45 days of the Commission's decision.

12. Soon after Silver King filed its opposition, it submitted a motion for expedited and consolidated action. In this pleading, Silver King asks the Commission to promptly resolve and deny petitions filed by cable operators who are evading their obligation to carry home shopping stations in their ADIs.[15] Silver King asserts that because the filing of ADI modification petitions preserves the *status quo* with respect to broadcast stations' signal carriage, any delay in acting on them "thwarts" full implementation of the Commission's will as expressed in the *Home Shopping Report and Order*.[16] Moreover, Congress expressly forbade cable systems from manipulating market modification procedures to defeat the public interest purposes of mandatory cable carriage and emphasized that cable systems cannot use the market modification procedures to avoid mandatory carriage obligations. Silver King concludes by stating that the cable operators' petitions "attempt to end-run the *Home Shopping Report and Order* by abusing the Commission's special relief procedures" and they should not be permitted to succeed.

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gramming.

[12] Using the measurement technique set forth in 47 C.F.R. §73.208(c), Time Warner calculated the distance of the following cable communities from Cleveland, Ohio: Lexington-72.97; Mineral City-64.19; Magnolia-61.94; Malvern-61.72; Waynesburg-61.63; Youngstown-61.02; East Sparta-59.73; East Canton-53.78; Canton-51.13; Louisville-50.96; Alliance-50.31; Masillon-49.27; Limaville-45.85; North Canton-45.63; Hartville-41.43; Doylestown-36.46; Lakemore-35.28.

[13] Time Warner notes that although the systems do not carry exactly the same local off-air broadcast stations, the systems currently carry the following commercial and non-commercial stations: WUAB (Ch. 43-Ind.); WKYC (Ch. 3-NBC); WBNX (Ch. 55-Ind.); WEWS (Ch. 5-ABC); WVIZ (Ch. 10-PBS); WDLI (Ch. 17-Ind.); WJW (Ch. 8-CBS); WOIO (Ch. 19-FOX); WAKC (Ch. 23-ABC); WNEO (Ch. 45-PBS); and WOAC (Ch. 67-Ind.).

[14] Silver King notes that Time Warner has filed at least eight petitions "seeking to evade mandatory carriage of home shopping stations."

[15] Silver King asks the Commission to consolidate two other market modification petitions filed by Time Warner into this proceeding: CSR-4108-A, which asks for modification of the Houston, Texas ADI vis-a-vis station KHSH, and CSR 4105-A which asks for modification of the Tampa-St. Petersburg, Florida ADI vis-a-vis station WBHS. Stations WQHS, WBHS, and KHSH are all licensed to Silver King.

[16] *See Home Shopping Station Issues*, 8 FCC Rcd 5321, 5327 (1993), *reconsideration pending*.

13. In its reply, Time Warner counters the arguments presented by Silver King in both its opposition to the petition for special relief and its motion for expedited and consolidated action.[17] With regard to Silver King's argument about the "piecemeal destruction of home shopping station must carry rights," Time Warner responds by stating that neither Congress nor the Commission has precluded the filing of a market modification petition where, as here, a particular station does not provide local service to certain cable communities. As for Silver King's discrimination claim, Time Warner states that Section 614(h)(1)(C)(ii)(III) of the 1992 Cable Act "expressly contemplates comparisons among stations where a particular station, such as WQHS-TV, fails to offer local programming of interest to the communities served by the cable system in relation to other stations carried." The operator then adds that the market modification procedure would be rendered meaningless if stations within an ADI could not be distinguished.

14. As for Silver King's arguments regarding the inapplicability of the historical carriage factor in deletion cases, Time Warner argues that nothing in the 1992 Cable Act indicates that certain factors are to be used only in considering a petition to add, but not one to delete, a community. Time Warner adds that past cable carriage is pertinent to this case because it guards against disruption of established viewing patterns. Time Warner also argues that, contrary to Silver King's assertion, the 35 mile zone and Grade B contour data are relevant under the second statutory factor to show the proximity of the station and thus the likelihood of local coverage and service.[18] The operator reiterates that WQHS's weekly programming demonstrates very little commitment to covering events and issues of local interest to the communities served by the system. Similarly, Time Warner argues that Silver King's placement of WQHS's non-shopping programs on Sunday mornings demonstrates its sparse efforts to serve local interests. As for the provision of local programming by other area stations, the operator argues that this statutory factor is relevant to the analysis because it allows specific communities to be excluded from the ADI of a station which provides little or no local service to those communities in comparison to local programming available from other stations carried by the cable system. The operator then states that while Silver King claims that WQHS provides more public service programming "quantitatively" than at least two other independent Cleveland stations, it appears that this figure is based largely on its repetition of short spots throughout the day. Time Warner also contends that Silver King can not and does not dispute the fact that WQHS has no reportable ratings. Because the station lacks viewership, carriage of the station would do nothing to further the statutory goals of promoting local programming service.

15. In its reply to Time Warner's opposition to the motion for expedited and consolidated action, Silver King reiterates that prompt Commission action is necessary to ensure that home shopping stations have mandated access to the audience they are obligated to serve. With regard to its public service programming, Silver King argues that the operator does not refute that its stations produce "substantially more local programming and air substantially more public service programming than many similarly situated market independent UHF stations" which the operator already carries. Silver King also argues that Time Warner does not demonstrate that the stations have failed to address a significant local need or have failed to ascertain community issues. In sum, Silver King states Time Warner's "privately motivated assessment" of WQHS's format, scheduling, and promotion should not and cannot support delay in carriage of the station.

16. Time Warner subsequently filed a motion to strike Silver King's reply to opposition stating that the referenced pleading "is unauthorized, unfairly reiterates argument from its Oppositions, and needlessly extends the pleading cycle. . . ." Time Warner argues that under Section 76.7(e) of the Commission's rules, its reply should have closed the pleading cycle with respect to its substantive showings under the statutory market modification proceedings. Time Warner concludes by stating that it is "ironic that Silver King, which claims to seek expedition, has burdened the Commission with a repetitive unauthorized pleading." The operator requests that Silver King's pleading should therefore be stricken.[19]

ANALYSIS AND DECISION

17. We deny Time Warner's petition for special relief.[20] WQHS is licensed to Cleveland, Ohio, a community in the Cleveland, Ohio ADI, a market that encompasses some 16 counties and is roughly 90 miles long and 100 miles wide. The station's studio and transmitter are located in Parma, directly south of the City of Cleveland and in the middle of a line of television stations stretching from Cleveland south to Akron. The station places a Grade A service contour over Akron and the cable communities served by Time Warner's Akron system. The station's Grade B contour covers Canton and the majority of cable communities served by Time Warner's Canton system. Given these facts and the general structure of the market, it appears at the outset that WQHS is logically part of this ADI as are virtually all of the cable communities in question.

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[17] Time Warner notes that Silver King's motion for expedited consideration should be dismissed as moot because Congress has already directed the Commission to grant expedited consideration to market modification petitions.

[18] With regard to the three Cleveland ADI television stations whose Grade B does not cover certain cable communities, Time Warner argues that the issue it raised was not directed at signal quality as much as whether the stations provide local service.

[19] Time Warner also filed a letter from Donald Plusquellic, the mayor of the City of Akron, Ohio, which supports the operator's petition. In this letter, the mayor notes that mandating carriage of WQHS will force the capacity of the system's basic service tier over the 12 channel limit and require the addition of converter equipment for basic-only subscribers. He adds that "the millions of dollars associated with this expense will ultimately be borne by the subscribers, who will be forced to pay more for something they neither need nor want."

[20] Because we may reach a conclusion based on the arguments presented in the pleadings filed in the official pleading cycle (*i.e.* petition for special relief, opposition, and reply) we need not address the repetitive arguments found in the supplemental material filed by the parties. We also decline Silver King's invitation to consolidate this proceeding with other petitions Time Warner has filed to delete KHSH from the Houston, Texas television market and WBHS from the Tampa, Florida television market because we judge the merits of market modifications on a case-by-case basis.

18. Focusing on the specific factors referenced in the statute, we conclude that Time Warner's arguments do not distinguish the majority of the cable communities from the rest of the market. With respect to the question of historical carriage patterns, Time Warner states that it has not carried the signal of WQHS since the station changed formats and has aired home shopping programming. We first agree with Silver King that the historical carriage factor is not controlling in these circumstances because the 1992 Cable Act would, in effect, prevent weaker stations which cable systems had previously declined to carry, from ever being carried. We also note that Time Warner did carry WQHS's predecessor WCLQ before 1986. We believe that this prior carriage is an indication that Time Warner, at one point in time, considered the station to be part of the Cleveland television market. The termination of carriage, in these circumstances, appears to reflect a program content judgment by Time Warner rather than evidence as to the shape of the market in question.

19. We also find Time Warner's arguments regarding WQHS's lack of ratings to be unpersuasive.[21] We recognize that home shopping stations, like religious or foreign language stations, which were once referred to as specialty stations, are capable of "offer[ing] desirable diversity of programming . . . ." yet typically attract limited audiences.[22] We continue to believe, as we did then, the fact that such stations attract a smaller audience share must be taken into account in determining the equities concerning a station's right to cable carriage.

20. Moreover, we do not believe that Time Warner's carriage of other local stations is sufficient to justify exclusion of its system from the above referenced communities.[23] Time Warner has not sufficiently demonstrated why it is necessary to remove itself from its own ADI, vis-a-vis WQHS, yet remain in the same market with regard to the station's competitors. We find that Time Warner's Petition is inconsistent with Congressional intent which clearly states that the market modification policy was not provided as a means for cable systems to avoid their must carry obligations.[24] This is particularly notable in this instance where Time Warner admits that it is carrying all other television stations in the Cleveland market except for WQHS.

21. We also find that Time Warner has failed to demonstrate that WQHS does not provide local coverage or service to a significant portion of the cable communities. With regard to the content of WQHS's programming, we note that home shopping formats are not incompatible with local appeal and recognize that such specialty programming traditionally has drawn smaller audiences. In fact, the Commission has specifically affirmed that home shopping stations may serve the public interest because, among other reasons, they provide "an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner."[25] Moreover, as Silver King has pointed out, we cannot weigh the merits of a television station's format or promotional activities when resolving signal carriage complaints or modifying television markets under the special relief process. In addition, WQHS places a Grade A signal over the Cleveland metropolitan area, Akron, and other relevant communities where Time Warner's subscribers are located. The station's Grade B contour also covers almost all of the Canton cable communities except for Malvern, Magnolia, Mineral City, and East Sparta and our independent analysis indicates that these communities are all no more than five miles away from the fringe of the Grade B contour. We therefore decline to grant Time Warner's request to delete these communities.[26]

ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Section 76.59 of the Commission's Rules, 47 C.F.R. § 76.59, that the "Petition for Special Relief" (CSR-4112-A) filed October 5, 1993 by Time Warner Cable IS DENIED. Silver King Broadcasting of Ohio, Inc. shall notify Time Warner in writing of its carriage and channel position elections. (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. Time Warner shall come into compliance with the applicable rules within 60 days of such notification.

23. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[21] We note, however, that according to *Arbitron's 1993 Television Market Guide*, WQHS garnered a 3 net weekly circulation in Huron County, Ohio which is geographically farther from the station than Akron or Canton, and a 2 net weekly circulation in Medina County, Ohio, which is southwest of Parma and directly west of Akron.

[22] *First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

[23] That other ADI licensees do in fact provide coverage of and service to the communities in question is not to the contrary. We do not believe that Congress intended this criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue, but rather that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue.

[24] H.R. Rep. No. 102-628, 102d Cong. 2nd Sess. at 97.

[25] *See* 8 FCC Rcd at 5327.

[26] We also note that the community of Lexington is 73 miles away from Cleveland and could be considered "distant" for market modification purposes. However, Time Warner did not indicate that this community falls outside the station's Grade B contour. We therefore will not delete Lexington from WQHS's ADI.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Petition of Time Warner Cable CSR-4113-A

Wapakoneta, OH
St. Mary's, OH
Greenville, OH
Union City, OH
Sidney, OH
Urbana, OH
Troy, OH

For Modification of ADI
Station WTJC, Springfield, OH

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1995; Released: July 24, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Before the Commission is a petition for special relief filed by Time Warner Cable ("Time Warner" or "operator") seeking to modify the Dayton, Ohio "area of dominant influence" ("ADI") and to exclude communities served by sevenTime Warner cable systems from WTJC's television market.[1] Video Mall Communications, Inc., ("VMC") licensee of television station WTJC-TV (Channel 26), Springfield, Ohio, filed an opposition to the petition to which Time Warner replied.[2]

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[3] and implementing rules adopted by the Commission in its Report and Order in MM Docket 92-259,[4] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[5] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[6]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

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> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such

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[1] The particular communities affected by this petition are served by seven separate headends: Wapakoneta --Wapakoneta (OH 0053) and Auglaize County (OH 0334), St. Mary's --St. Mary's (OH 0050) and Auglaize County (OH 0337), Urbana --Woodstock (OH 1896), Urbana City (OH 0607), Mechanicsburg (OH 0635), Mutual Village (OH 2055), West Liberty (OH 0636), Champaign (OH 1438), and Logan (OH 2054), Troy --Casstown (OH 1025), Concord (OH 0648), Elizabeth (OH 1026), Lost Creek (OH 1027), Staunton (OH 1028) and Troy (OH 0646), Sidney --Urbana (OH 0607), Sidney (OH 0051 and OH 1002), Clinton (OH 1491), Perry (OH 1638), Franklin (OH 0241), Washington (OH 0136), and Logan County (OH 2054), Greenville --Van Buren (OH 0858), Greenville (OH 0494), Gettysburg (OH 0853), New Madison, OH 0854, Ansonia (OH 0855), Wayne Lakes (OH 0979), Adams (OH 0857), Brown (OH 0861), Neave (OH 0859), Butler (OH 0860), Greenville (OH 0856), Richland (OH 1001), and Darke County (OH 0524), Union City --Union City (OH 0052) and Union City (IN 0047(collectively known as the "communities").

[2] Subsequent to its reply, Time Warner also filed two letters from the Cities of Greenville, OH and Union City, IN, which support its petition for special relief.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[5] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[6] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e. g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headed of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headed of the cable system.[11] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. In its petition for special relief, Time Warner "requests that the Commission modify WTJC's ADI market to exclude the communities" served by the referenced Dayton area cable systems. The operator asserts that mandatory carriage of the station will force it to make consumer unfriendly changes in its basic tier line-ups to accommodate WTJC. Time Warner believes that it "should be granted relief from mandatory carriage" because the station does not provide local programming to the communities in question and fails to satisfy any of the four market factors set forth in the 1992 Cable Act and the Commission's rules.

9. Petitioner alleges that WTJC does not provide local service to the relevant communities. Specifically, WTJC broadcasts home shopping programming that is almost exclusively without any focus on interests and issues involving the Dayton area. Time Warner adds that the non-shopping programs the station does air are short segment "fillers" found between sales presentations or are programs broadcast primarily on Sunday mornings when viewing is at a minimum. And while the station airs some children's and public affairs programming, these shows are nationally syndicated and neglect important local issues. Furthermore, the station's other local programming, such as "Springfield Today," is oriented toward events in Spring-

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[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[8] 8 FCC Rcd at 2977 (emphasis in original).
[9] *Id.* and n.139.
[10] 47 C.F.R. §76.59.
[11] 8 FCC Rcd at 2981.

field, OH, WTJC's city of license, and not targeted to residents in the cable communities. The operator also notes that Springfield is not physically proximate to many communities served by the cable system; in this regard, Time Warner asserts that the 35 mile zone for Springfield does not cover the systems serving St. Mary's, Wapakoneta, Union City, and Greenville. These systems are also located beyond WTJC's Grade B contour and are unable to receive an adequate quality signal as required by the 1992 Cable Act and FCC rules.

10. With regard to the historical carriage factor, the operator asserts that WTJC has never been carried on the systems since they were acquired from Centel in late 1989.[12] The operator states that the station is not carried because its programming is of no interest to subscribers. As for other stations serving the market, Time Warner states that several Dayton ADI stations, which have been carried for several years on the cable system, provide an extensive amount of local programming throughout each broadcast day.[13] Time Warner also mentions that it meets local community concerns through its carriage of educational and public access channels as well as the Weather Channel. Finally, the operator alleges that WTJC had a reportable net weekly circulation of at least 5% in only a single county, Logan County, OH, where none of the systems are located.

11. In its opposition, VMC generally states that Time Warner's petition flaunts Congressional intent with respect to ADI market modifications and asserts that WTJC is a local station in the cable communities. VMC asserts that Time Warner is abusing the Commission's processes by "pursuing piecemeal destruction of home shopping stations' must carry rights through petitions which seek to evade its obligation to carry individual home shopping stations."[14] VMC argues that the motivation behind these petitions is to eliminate any competition that may affect Time Warner's proposed cable home shopping service. VMC also believes that Time Warner has impermissibly singled the station out for different treatment from all other Dayton stations by purposefully avoiding compliance with the 1992 Cable Act's must carry objectives vis-a-vis WTJC.

12. To rebut Time Warner's lack of public interest programming claim, VMC notes that WTJC broadcasts programming on such topics as traffic safety, health information, and senior citizen concerns, which is of interest to all viewers regardless of their specific geographic location. Moreover, VMC states that the Commission has found that home shopping generally serves the public interest and Time Warner's objections do not support a change in this conclusion. VMC also asserts that the operator fails to: (1) demonstrate that programs are worthy of Commission consideration only if they are half-hour programs; (2) submit any information which suggests that WTJC does not address a particular significant community issue or has otherwise abused its discretion; and (3) provide any support for its suggestion that stations' public service programming may be considered for purposes of mandatory carriage qualification only if the station promotes or produces it. On this last point, VMC notes that other Dayton stations whose programming Time Warner praises also carry large amounts of network and syndicated nonlocal programming. VMC also asserts that the physical distance between the WTJC and the cable communities is not determinative because, if this were a controlling factor, Time Warner would not be required to carry any Dayton market station more than 35 miles away. Moreover, must carry rights are determined by ADIs and not by 35 mile zones. VMC rebuts the operator's Grade B argument on similar grounds stating that carriage rights depend upon ADIs rather than service contour locations. With regard to Time Warner's claim about WTJC's poor quality signal, VMC states that the operator did not conduct its signal quality measurements according to Commission testing guidelines.

13. With regard to past cable carriage, VMC argues that this factor is not controlling in market deletion cases because the 1992 Cable Act would have accomplished nothing more than maintaining the *status quo* with respect to weaker stations which cable systems had previously declined to carry. As for other stations serving Dayton, VMC argues that Time Warner cannot compare the quantity of WTJC's public service programming with that of other Dayton market stations because must carry rights do not depend on the amount of a station's programming. With respect to viewership, VMC asserts that it would be contrary to First Amendment principles to base must carry rights on the popularity of particular stations as Time Warner would like the Commission to do. It also notes that Time Warner's viewership demonstration, or lack thereof, is not an accurate and reliable indicator of WTJC's viewership. VMC concludes by asking the Commission to deny Time Warner's petition and order the operator to commence carriage of WTJC within 45 days of the Commission's decision.

14. In its reply, Time Warner counters the arguments presented by VMC in its opposition to the petition for special relief. With regard to VMC's argument about the "piecemeal destruction of home shopping station must carry rights," Time Warner responds by stating that neither Congress nor the Commission has precluded the filing of a market modification petition where, as here, a particular station does not provide local service to certain cable communities. As for VMC's discrimination claim, Time Warner states that it has not singled out WTJC for disparate treatment as it has sought a market modification with respect to another Dayton ADI station, WKOI, licensed to Richmond, Indiana. In both cases, Time Warner believes that the station at issue does not provide the requisite local service.

15. As for VMC's arguments regarding the inapplicability of the historical carriage factor in deletion cases, Time Warner argues that nothing in the 1992 Cable Act indicates that certain factors are to be used only in considering a petition to add, but not one to delete, a community. Time Warner adds that past cable carriage is pertinent to this case because it guards against disruption of established viewing patterns. In this case, the systems would be required to drop an existing cable service to carry the less-viewed WTJC, contrary to the congressional policy to avoid

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[12] Time Warner notes that prior to becoming a home shopping station in 1990, WTJC carried primarily religious programming.

[13] Time Warner notes that although the broadcast channel line-ups in each of the systems differ, all of the systems carry the following local stations: WDTN (Ch. 2-ABC); WKEF (Ch. 22-NBC); WHIO (Ch. 7-CBS); and WRGT (Ch. 45-Ind.).

[14] VMC notes that Time Warner has filed 10 petitions "seeking to evade mandatory carriage of home shopping stations."

disruption. Time Warner also argues that, despite VMC's assertion, the 35 mile zone and Grade B contour data are relevant under the second statutory factor to show the proximity of the station and thus the likelihood of local coverage and service.[15] The operator reiterates that WTJC's weekly programming demonstrates very little commitment to covering events and issues of local interest to the communities served by the systems geographically distant from Springfield. Time Warner also states that although WTJC claims that its non-shopping programming is of general interest to all viewers, it fails to show how such programming advances the goals of localism which the must carry rules were intended to foster. As for the provision of local programming by other area stations, the operator argues that VMC's "quantity" argument is off-the-mark because the intent behind the must carry provisions of the 1992 Cable Act was to encourage localism and VMC ignores the statutory mandate that localism is the main factor for the Commission to consider when modifying television markets. Time Warner also contends that VMC's attack on the viewership data as unreliable is unwarranted because the information was culled from Arbitron. Time Warner concludes by stating that VMC's constitutional attack on audience data is unfounded because Congress believed viewership is a proper measure of where a local service exists.

ANALYSIS AND DECISION

16. We deny Time Warner's petition for special relief. WTJC is licensed to Springfield, Ohio, a community in the Dayton, Ohio ADI, a market that encompasses some 12 counties and is roughly 75 miles long and 70 miles wide. The station's studio and transmitter are located in Springfield, a community 25 miles northeast of Dayton. The station places a Grade A service contour over Champaign County and the cable communities served by Time Warner's Urbana system. The station's Grade B contour covers the cable communities served by Time Warner's Troy and Sidney systems. Given these facts and the general structure of the market, it appears at the outset that WQHS is logically part of this ADI as are the cable communities in question.

17. Focusing on the specific factors referenced in the statute, we conclude that Time Warner's argument do not distinguish the cable communities from the rest of the market. With respect to the question of historical carriage patterns, Time Warner states that it has not carried the signal of WTJC since the systems were acquired from Centel in 1989. We agree with VMC that the historical carriage factor is not controlling in these circumstances because the 1992 Cable Act would, in effect, prevent weaker stations which cable systems had previously declined to carry, from ever being carried.

18. We also find Time Warner's arguments regarding WTJC's lack of ratings to be unpersuasive. First, we note that according to *Arbitron's 1993 Television Market Guide*, WTJC garnered a 1 share and a 2 net weekly circulation in Champaign County, Ohio, a 1 share and 2 net weekly circulation in Miami County, Ohio, a 4 net weekly circulation in Logan County, Ohio and a 3 net weekly circulation in Shelby County, Ohio..[16] Each of these counties contain communities served by Time Warner. We also recognize that home shopping stations, like religious or foreign language stations, which were once referred to as specialty stations, are capable of "offer[ing] desirable diversity of programming . . . ," yet typically attract limited audiences.[17] We continue to believe, as we did then, the fact that such stations attract a smaller audience share must be taken into account in determining the equities concerning a station's right to cable carriage.

19. We also find that Time Warner has failed to demonstrate that WTJC does not provide local coverage or service to a significant portion of the cable communities. With regard to the content of WTJC's programming, we note that home shopping formats are not incompatible with local appeal and recognize that such specialty programming traditionally has drawn smaller audiences. In fact, the Commission has specifically affirmed that home shopping stations may serve the public interest because, among other reasons, they provide "an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner."[18] Moreover, Time Warner's arguments against home shopping stations appear dubious as all of its systems subject to the petition are carrying QVC, the cable home shopping channel. In addition, WTJC places a Grade A signal over the communities served by the Urbana system and at least a Grade B over the communities served by the Troy and Sidney systems.

20. While we recognize that the Wapakoneta, St. Mary's, Union City, and Greenville systems appear outside the station's Grade B contour and the communities served by the former three systems are also at least 50 miles away from Springfield, we decline Time Warner's invitation to delete these communities from WTJC's ADI. The operator has not sufficiently demonstrated why it is necessary to remove itself from its own ADI, vis-a-vis WTJC in these communities, yet remain in the same market with regard to the station's competitors.[19] We note that there are only 6 television stations licensed to communities in the Dayton ADI and Time Warner is willing to carry only 4 of them excepting WTJC and WKOI, a religious station licensed to Richmond, Indiana. At the same time, however, Time Warner is carrying WXIX, the Cincinatti, Ohio FOX affiliate on its Greenville system, WBNS, the Columbus, Ohio CBS affiliate on its St. Mary's and Wapakoneta systems, and WTTK, an independent station licensed to Bloomington-Kokomo on its Union City system. All of these

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[15] Time Warner notes that its Yellow Springs cable system, which is located close to Springfield, carries WTJC as part of the basic tier and is not the subject of this petition because the station provides local service to the cable communities.

[16] These data are county-based, rather than community-specific. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data are acceptable as probative, although not conclusive, in cases of this type.

[17] *First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

[18] *See* 8 FCC Rcd at 5327.

[19] That other ADI licensees do in fact provide coverage of and service to the communities in question is not to the contrary. We do not believe that Congress intended this criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue, but rather that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue.

stations are in other ADIs and appear farther from the systems than Springfield. In this instance, we find that Time Warner's Petition is inconsistent with Congressional intent which clearly states that the market modification policy was not provided as a means for cable systems to avoid their must carry obligations.[20]

ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Section 76.59 of the Commission's Rules, 47 C.F.R. § 76.59, that the "Petition for Special Relief" (CSR-4113-A) filed October 5, 1993 by Time Warner Cable IS DENIED. Video Mall Communications, Inc. shall notify Time Warner in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. Time Warner shall come into compliance with the applicable rules within 60 days of such notification.

22. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[20] H.R. Rep. No. 102-628, 102d Cong. 2nd Sess. at 97.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Petition of Time Warner Cable CSR-4114-A

Jefferson TWP, OH
Germantown, OH
Lewisburg, OH
Piqua, OH
St. Paris, OH
Tipp City, OH

For Modification of ADI
Station WTJC, Springfield, OH

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1995; Released: July 24, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Before the Commission is a petition for special relief filed by Time Warner Cable ("Time Warner" or "operator") seeking to modify the Dayton, Ohio "area of dominant influence" ("ADI") and to exclude communities served by six Time Warner cable systems from WTJC's television market.[1] Video Mall Communications, Inc. ("VMC"), licensee of Television Broadcast Station WTJC (Channel 26), Springfield, Ohio, filed an opposition to the petition to which Time Warner replied.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such

[1] Six cable systems serve the following communities affected by this petition: Piqua-- Washington (OH 0136), Adams (OH 1048), Bradford (OH 0697 and OH 0698), Covington (OH 0555), Newberry (OH 0554), Newton (OH 1055), Piqua (OH 0134), Pleasant Hill (OH 0753), Spring Creek (OH 0135), Fletcher (OH 1721), and Brown Twp (OH 1750); Tipp City--Butler (OH 1423), Laura (OH 1424), Ludlow Falls (OH 1425), Monroe (OH 0647 and OH 0833), Tipp City (OH 0832), Union (OH 0812), West Milton (OH 0808), and Potsdam (OH 1426); St. Paris--Jackson (OH 1052), Johnson (OH 1053), St. Paris (OH 0700), and Christiansburg (OH 1655); Germantown-- Farmersville (OH 1551), Germantown (OH 1051), and German Township (OH 1278); Jefferson-- Jefferson (OH 1305); Lewisburg-- West Elkton (OH 1752), Arcanum (OH 0915), Brookville (OH 0687), Camden (OH 0684), Madison Twp (OH 1331), Eaton (OH 0685), Eldorado (OH 1552), Gratis (OH 0975), Lewisburg (OH 0680), New Lebanon (OH 0686), New Paris (OH 0683), Phillipsburg (OH 0688), Pitsburg (OH 1283), Verona (OH 0682), West Alexandria (OH 0681), West Manchester (OH 1553), Castine (OH 1753), Ithaca (OH 1754), and Gordon (OH 1755) (collectively known as "the Communities").

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
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> * * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headed of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headed of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.*, when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. In its petition, Time Warner "requests that the WTJC market be modified so as to relieve [it] from any obligation to carry that station" on its Dayton area cable systems. The operator asserts that mandatory carriage of the station will force it to make consumer unfriendly changes in its basic tier line-ups to accommodate WTJC. Time Warner believes that it should be granted relief from mandatory carriage because the station does not provide local service and fails to satisfy any of the four market factors set forth in the 1992 Cable Act and the Commission's Rules.

9. Petitioner principally alleges that WTJC does not provide local programming to the Communities. Specifically, Time Warner alleges that WTJC broadcasts home shopping programming that is almost exclusively without any focus on interests and issues involving the Dayton area. Time Warner adds that the non-shopping programs the station does air are short segment "fillers" found between sales presentations or are programs broadcast primarily on Sunday mornings when viewing is at a minimum. While the station airs some children's and public affairs programming, these shows are nationally syndicated and neglect important local issues. Furthermore, the station's other local programming, such as "Springfield Today," is oriented toward events in Springfield, OH, WTJC's city of license, and not targeted to residents in the Communities. The operator also notes that Springfield is not physically

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[7] 8 FCC Rcd at 2977 (emphasis in original).
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[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.

proximate to many communities served by the cable system; in this regard, Time Warner asserts that although WTJC appears proximate to the systems, this proximity is deceiving. The operator states, for example, that WTJC has been unable to deliver an adequate quality signal to the Germantown and Lewisburg systems as required by the 1992 Cable Act and FCC rules.

10. With regard to the historical carriage factor, the operator asserts that WTJC was dropped from each of the cable systems shortly after they were acquired from Centel in late 1989. The operator states that it declined to carry the station because WTJC changed its format from a religious station to a home shopping station. Time Warner adds that since the station's programming is not locally oriented, the systems have no incentive to carry it. As for other stations serving the market, Time Warner states that several Dayton ADI stations, which have been carried for several years on the cable system, provide an extensive amount of local programming throughout each broadcast day.[11] Time Warner also mentions that it meets local community concerns through its carriage of educational and public access channels as well as the Weather Channel. Finally, it alleges that WTJC had a reportable net weekly circulation of at least 5% in only a single county, Logan County, OH, where none of the systems are located.

11. In its opposition, VMC generally states that Time Warner's petition flouts Congressional intent with respect to ADI market modifications and asserts that WTJC is a local station in the Communities. VMC asserts that Time Warner is abusing the Commission's processes by "pursuing piecemeal destruction of home shopping stations' must carry rights through petitions which seek to evade its obligation to carry individual home shopping stations."[12] VMC argues that the motivation behind these petitions is to eliminate any competition that may affect Time Warner's proposed cable home shopping service. VMC also believes that Time Warner has impermissibly singled the station out for different treatment from all other Dayton stations by purposefully avoiding compliance with the 1992 Cable Act's must carry objectives vis-a-vis WTJC.

12. To rebut Time Warner's lack of public interest programming claim, VMC notes that WTJC broadcasts programming on such topics as traffic safety, health information, and senior citizen concerns, which is of interest to all viewers regardless of their specific geographic location. Moreover, VMC states that the Commission has found that home shopping generally serves the public interest, and Time Warner's objections do not support a change in this conclusion. VMC also asserts that the operator fails to: (1) demonstrate that programs are worthy of Commission consideration only if they are half-hour programs; (2) submit any information which suggests that WTJC does not address a particular significant community issue or has otherwise abused its discretion; and (3) provide any support for its suggestion that stations' public service programming may be considered for purposes of mandatory carriage qualification only if the station promotes or produces it. On this last point, VMC notes that other Dayton stations whose programming Time Warner praises also carry large amounts of network and syndicated nonlocal programming. As for Time Warner's claim about WTJC's poor quality signal, VMC states that the operator did not conduct its signal quality measurements according to Commission testing guidelines. In particular, the operator's test data failed to indicate the height of the antenna above ground level, whether the antenna was properly oriented, weather conditions, and the time of day when the signal strength surveys were conducted.

13. With regard to past cable carriage, VMC argues that this factor is not controlling in market deletion cases because the 1992 Cable Act would have accomplished nothing more than maintaining the *status quo* with respect to weaker stations which cable systems had previously declined to carry. As for other stations serving Dayton, VMC argues that Time Warner cannot compare the quantity of WTJC's public service programming with that of other Dayton market stations because must carry rights do not depend on the amount of a station's programming. With respect to viewership, VMC asserts that it would be contrary to first amendment principles to base must carry rights on the popularity of particular stations as Time Warner would like the Commission to do. It also notes that Time Warner's viewership demonstration, or lack thereof, is not an accurate and reliable indicator of WTJC's viewership. VMC concludes by asking the Commission to deny Time Warner's petition and order the operator to commence carriage of WTJC.

14. In its reply, with regard to VMC's argument about the "piecemeal destruction of home shopping station must carry rights," Time Warner responds that neither Congress nor the Commission has precluded the filing of a market modification petition where, as here, a particular station does not provide local service to certain cable communities. As for VMC's discrimination claim, Time Warner states that it has not singled out WTJC for disparate treatment as it has sought a market modification with respect to another Dayton ADI station, WKOI, licensed to Richmond, Indiana. In both cases, Time Warner believes that the station at issue does not provide the requisite local service.

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[11] Time Warner notes that although the broadcast channel line-ups in each of the systems differ, all of the systems carry the following local stations: Television Broadcast Stations WDTN (ABC, Channel 2), WKEF (NBC, Channel 22), WHIO-TV (CBS, Channel 7), WRGT-TV (Ind., Channel 45), and WPTD (PBS, Channel 16), all Dayton, Ohio; WXIX-TV (Ind., Channel 19), Newport, Kentucky; and except for the Lewisburg system, WKRC-TV (ABC, Channel 12), Cincinnati, Ohio.

[12] VMC notes that Time Warner has filed 10 petitions "seeking to evade mandatory carriage of home shopping stations."

VMC's "quantity" argument is off-the-mark because the intent behind the must carry provisions of the 1992 Cable Act was to encourage localism and VMC ignores the statutory mandate that localism is the main factor for the Commission to consider when modifying television markets. Time Warner also contends that VMC's attack on the viewership data as unreliable is unwarranted because the information was culled from Arbitron, noting that the Commission has long recognized the reliability of this organization's information. Time Warner concludes by stating that VMC's constitutional attack on audience data is unfounded because Congress believed viewership is a proper measure of where a local service exists.

ANALYSIS AND DECISION

16. We deny Time Warner's petition for special relief. WTJC is licensed to Springfield, Ohio, a community in the Dayton, Ohio ADI, a market that encompasses some 12 counties and is roughly 75 miles long and 70 miles wide. The station's studio and transmitter are located in Springfield, a community 25 miles northeast of Dayton. The station places a Grade A service contour over Champaign County and the cable communities served by Time Warner's St. Paris system. The station's Grade B contour covers the cable communities served by Time Warner's Piqua, Tipp City, Germantown and Jefferson systems, which are located in Miami and Montgomery Counties. The Grade B also covers several communities served by the Lewisburg system, which is located in Preble County. Given these facts and the general structure of the market, it appears at the outset that WTJC is logically part of this ADI as are the communities in question.

17. Focusing on the specific factors referenced in the statute, we conclude that Time Warner's arguments do not distinguish the Communities from the rest of the market. With respect to the question of historical carriage patterns, Time Warner admits that WTJC was carried by its predecessor, Centel, and that Time Warner only dropped the signal after it acquired the systems in 1989 and when the station changed formats in 1990. We view Centel's carriage of WTJC as evidence of historical carriage and as evidence of the relation of these communities to the Dayton economic market. This rationale continues despite WTJC's adoption of a new programming format. We nevertheless agree with VMC that the historical carriage factor is not controlling in these circumstances because such an interpretation of the 1992 Cable Act would, in effect, prevent weaker stations which cable systems had previously declined to carry, from ever being carried.

18. We also find Time Warner's arguments regarding WTJC's lack of ratings to be unpersuasive. First, we note that according to *Arbitron's 1993 Television Market Guide*, WTJC garnered a 1 share and a 2 net weekly circulation in Champaign County, Ohio, and a 1 share and 2 net weekly circulation in Miami County, Ohio.[13] Each of these counties contains communities served by Time Warner. We also recognize that home shopping stations, like religious or foreign language stations, once referred to as specialty stations, are capable of "offer[ing] desirable diversity of programming . . . ," yet typically attract limited audiences.[14] We continue to believe, as we did then, the fact that such stations attract a smaller audience share must be taken into account in determining the equities concerning a station's right to cable carriage.

19. Moreover, we do not believe that Time Warner's carriage of other local stations is sufficient to justify exclusion of its system from the above referenced communities.[15] Time Warner has not sufficiently demonstrated why it is necessary to remove itself from its own ADI, vis-a-vis WTJC, yet remain in the same market with regard to the station's competitors. We find that Time Warner's petition is inconsistent with Congressional intent which clearly states that the market modification policy was not provided as a means for cable systems to avoid their must carry obligations, nor is it "intended to permit a cable system to discriminate among several stations licensed to the same community."[16]

20. We also find that Time Warner has failed to demonstrate that WTJC does not provide local coverage or service to a significant portion of the cable communities. With regard to the content of WTJC's programming, we note that home shopping formats are not incompatible with local appeal and recognize that such specialty programming traditionally has drawn smaller audiences. In fact, the Commission has specifically affirmed that home shopping stations may serve the public interest because, among other reasons, they provide "an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner."[17] In addition, WTJC places a Grade A signal over the communities served by the St. Paris system and at least a Grade B signal over the communities served by the cable systems in Piqua, Tipp City, Germantown, Jefferson, and the majority of Lewisburg. In light of the station's history of carriage on the systems and the other factors weighing against deletion discussed above, we also decide not to remove Camden and New Paris from WTJC's ADI even though these communities fall outside its Grade B contour and are more distant from Springfield.

21. Finally, Time Warner's claim about WTJC's poor signal quality, although relevant for the purposes of must carry, are of less consequence when evaluating petitions to delete communities from certain markets. A full power television station, like WTJC, has the right to purchase the necessary equipment to cure signal quality deficiencies.[18] In any event, the data presented by Time Warner falls short of the Commission's signal testing requirements because the operator measured WTJC's signal only once, and as VMC noted, did not provide the requisite testing information.[19]

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[13] These data are county-based, rather than community-specific. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data are acceptable as probative, although not conclusive, in cases of this type.

[14] *First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

[15] That other ADI licensees do in fact provide coverage of and service to the communities in question is not to the contrary. We do not believe that Congress intended this criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue, but rather that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue.

[16] H.R. Rep. No. 102-628, 102d Cong., 2nd Sess. 97-98.

[17] *See* 8 FCC Rcd at 5327.

[18] *See* 8 FCC Rcd at 2991.

[19] To measure a station's signal to see if it meets the Commission's requirements, a cable operator's signal strength surveys

ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to §614(h) of the Communications Act of 1934, as amended, 47 U.S.C. §534, and §76.59 of the Commission's Rules, 47 C.F.R. §76.95, that the "Petition for Special Relief" (CSR-4114-A) filed October 5, 1993, by Time Warner Cable IS DENIED. Video Mall Communications, Inc. shall notify Time Warner in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. Time Warner shall come into compliance with the applicable rules within 60 days of such notification.

23. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. In addition, our rules require that a cable operator must conduct multiple signal quality tests to ensure accurate results and, in turn, provide that testing information to the affected station when there is a dispute over signal level measurements. Generally, if the test results are less than -51 dBm for a UHF station, we have said that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24 hour period with measurements not more than four hours apart to establish reliable test results.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of West Virginia, Inc. CUID No. WV0096 (Chester)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: July 13, 1995; Released: July 24, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of the Heartlands, Inc. CUID No. IA0070 (Fort Dodge)

TCI Cablevision of Mid-Michigan, Inc. CUID No. MI0058 (East Lansing)

TCI Cablevision of Ohio, Inc. CUID No. OH1392 (Danbury)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 1995; Released: July 24, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. For the franchise areas designated as CUID Nos. IA0070 and OH1392, the Operators' actual CPS tier prices equalled their calculated maximum permitted prices. For the franchise area designated by CUID No. MI0058, the Operator's actual CPS tier price was above the maximum permitted price that it calculated for the CPS tier and, thus, the Operator failed to demonstrate that its price for the CPS tier was not unreasonable. Upon review of Operators' Form 393 filings, we have found that they have not correctly calculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in Form 393:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[12] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[13] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] 47 U.S.C. § 543(b)(3).

[13] 47 C.F.R. § 76.923(b).

equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[14] When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operators, however, have not properly completed Part III of their FCC Form 393s and thus have not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III, Operators have not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B they have not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operators' Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operators make in their Schedule B Analyses, however, indicate that their own employees performed customer equipment installation and maintenance.

c. Not only are Operators' Schedule B allocations inconsistent with not having any maintenance facility costs, their allocations are also inconsistent with the argument that the repair of converters and remotes was performed off-premises by a third party. Operators have included on Schedule B and their Schedule B Analyses entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operators have not fully unbundled their equipment costs from their regulated service costs. In their Part III, Step C, Line 9 explanations, Operators set forth the number of hours that they devoted to maintenance and service of remotes and converters.[15] If Operators' contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in these communities ranges from $2.31 to $15.31. Moreover, this calculation overstates Operators' reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and converters.[16] Not only are Operators' reported labor costs for the service and maintenance of remotes and converters substantially below this figure, they are also well below their own hourly service charge as calculated on Line 5, Step A, Part III of their Form 393s.[17] Thus, Operators' contract labor cost added to their Converter Maintenance cost cannot represent all of Operators' converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operators have not included on Form 393, Part III.[18]

d. Operators have not justified their Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[19] Simply put, Operators cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operators have not justified their Part III allocations and have not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operators' Part II, Worksheet 3, Line 303 entry in each community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[20] We have further determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, Operators must have incurred more installation and customer equipment costs than they reported, and we have therefore revised their entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301.[21] While we recognize that this

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[14] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[15] *See also* Operators' FCC Form 393s at Part III, Line 9 and Line 16.

[16] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19 -20 (Cab. Serv. Bur., released Feb. 7, 1995).

[17] Operators' calculated hourly service charge in these communities ranges from $21.51 to $24.08.

[18] If, as in other communities, Operators are charging a wire maintenance fee, we would expect to see these costs reflected in Operators' rate justification filings. The absence of these costs would provide additional evidence that Operators have not fully unbundled their equipment costs from their programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operators' permitted rates that may be caused by this error.

[19] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[20] *Cf.* United Video Cablevision, Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

[21] This adjustment to Worksheet 1 has the effect of causing Operators in some franchise areas to calculate their permitted rate from Form 393, Part II, Worksheet 2 rather than Worksheet 1. In those franchise areas where Operators did not file a

is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. Because the Operator for the franchise area designated by CUID No. IA0070 has failed to demonstrate that its price for the CPS tier was not unreasonable, we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operator filed.[22] On its amended Form 393, the Operator calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date the Operator used in justifying its rate, of 1.034.

f. Because the Operators for the franchise areas designated by CUID Nos. OH1392 and MI0058 have failed to demonstrate that their prices for the CPS tier were not unreasonable, we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operators filed.[23] On their amended Form 393s, the Operators calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operators used in justifying their rates, of 1.030.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[24]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[25] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[26]

11. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
IA0070	12/10/93	12/7/93
MI0058	10/18/93	10/16/93
OH1392	11/30/93	11/26/93

Worksheet 2 and one is needed, we have computed Worksheet 2 by using data supplied by Operators on their Form 1200 filings.

[22] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[23] *Id.*

[24] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[25] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[26] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
IA0070	$10.60	$10.30
MI0058	$9.93	$9.58
OH1392	$11.34	$10.62

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SAMMONS COMMUNICATIONS, INC.

Appeals of Local Rate Order
of the City of Burbank, CA

MEMORANDUM OPINION AND ORDER

Adopted: July 18, 1995; Released: July 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 5, 1995, Sammons Communications, Inc. ("Sammons"), the franchisee in the above matter, filed an appeal of the local cable rate order ("rate order") adopted on December 6, 1994 by its franchising authority, the City of Burbank, California ("the City").[1] On January 19, 1995, the City filed an opposition to Sammons' appeal. On February 1, 1995, Sammons filed a reply. The rate order establishes a new regulated rate schedule for Sammons' basic service tier rates and associated equipment.[2] Specifically, the City's rate order requires Sammons to implement certain rate reductions and to issue refunds to subscribers, dating back to July 15, 1994.

2. Sammons argues that the City, in prescribing the rate for basic service, misapplied the Commission's instructions to Line C2, Module C in FCC Form 1200. FCC Form 1200 instructs operators to indicate on Line C2 the number of regulated non-broadcast channels per tier.[3] Sammons asserts that the City erred in finding that one of its channels (*i.e.*, KTBN) should be classified as a broadcast channel as opposed to a non-broadcast channel. Even if the City's interpretation of the Commission's rules is correct, Sammons argues that its refund liability would not arise but for the operation of the must-carry rules, which Sammons contends are unconstitutional. Sammons urges the Commission to remand the City's rate order in light of the pendency of the legal challenge to the must-carry rules. In response, the City maintains that it correctly applied the Commission's instructions in FCC Form 1200, and that because the Commission's must-carry rules have not been declared unconstitutional by any competent court, they continue to remain in effect.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

4. FCC Form 1200 is the official form used to determine whether initial regulated rates for programming are reasonable under the revised benchmark rules which apply to operators beginning May 15, 1994 or upon the expiration of the deferral period provided under our rules for operators to comply with the revisions to ourrules.[8] Through the use of Form 1200, an operator generally calculates three sets of figures: (1) the operator's actual March 31, 1994 rate level; (2) the operator's March 31, 1994 benchmark rate level; and (3) the operator's "full reduction" rate level. These figures are used to derive an operator's maximum initial permitted rates.

5. The operator first completes Module A of the Form 1200 to calculate its March 31, 1994 per subscriber monthly regulated revenue. Next, the operator completes Module B to calculate changes in external costs which the operator is entitled to reflect in its rates, but which have not yet been passed through to its subscribers. In Module C the operator enters its data with respect to a number of variables to calculate its March 31, 1994 benchmark rate level on a per subscriber, per month basis. The operator's March 31, 1994 actual rate level (Module A plus external costs calculated in Module B) is then compared to the benchmark rate level derived in Module C, with the operator carrying forward the smaller of the two. If the March 31, 1994 actual rate level is smaller, the operator completes Module D, subtracting the monthly per subscriber equipment cost calculated in Form 1205 and adding external costs calculated from Module B. If the benchmark rate level is smaller, the operator completes Module E, subtracting the monthly per subscriber equipment cost taken from Form 1205. Depending on which is used, either

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[1] With its appeal, Sammons also filed a Request for Stay of the City's rate order, pending Commission resolution of this appeal. Because we reach the merits of Sammons' appeal in this order, the request for stay will be dismissed as moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] *See* FCC Form 1200 at 16.

[4] *See* 47 C.F.R. § 76.944.

[5] *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5731(1993) (*"Report and Order"*); Third Order on Reconsideration in MM Docket 92-266, FCC 94-40, 9 FCC Rcd 4316, 4345 (1994) (*"Third Recon. Order"*).

[6] *Id.*

[7] *Id.*

[8] *See* Second Order on Reconsideration, Fourth Report and Order, Fifth Notice of Proposed Rulemaking in MM Docket

Module D or E establishes per-tier rates, which the operator carries forward into Module F, as its so-called provisional rates.[9]

6. In the second part of Form 1200, the operator derives its full reduction rate based on its September 30, 1992 rates. To compute this rate, in Module G, the operator calculates its September 30, 1992 total monthly regulated revenues per subscriber, reduces that amount by 17%, and adjusts upward by 3% to reflect the inflation from September 30, 1992 until September 30, 1993. In Module H, the operator then adjusts the results from Module G forchanges since September 30, 1992 with respect to the number of regulated channels carried. In Module I, the operator subtracts a monthly per subscriber equipment cost amount from Form 1205, establishes per-tier rates, and adjusts for changes in external costs. In Module J, the operator compares its aggregate provisional rate with its aggregate full reduction rate. The maximum permitted rates an operator is actually allowed to charge are either the provisional rates (Module F) or the full reduction rates (Module I), depending on whether the aggregate provisional rate is greater or less than the aggregate full reduction rate. The maximum permitted rates are entered into Module K. In addition to Form 1200, an operator may file Form 1210, up to quarterly, to claim changes in external costs, the number of regulated channels and inflation that justify rate increases.

A. Line C2 of Form 1200

7. In computing its benchmark rate level in Module C, an operator is required to provide entries for the various benchmark variables. The benchmark formula is intended to derive a rate level which approximates the level a similarly situated operator subject to competition would charge. The benchmark rate level is based on the benchmark variables, which include, for example, the number of subscribers, the number of regulated channels, and the number of additional outlets charged.[10] The benchmark formula's only function in the new system is to determine which operators are "low-priced" operators subject to transition relief and therefore not required to set their rates based on their full reduction rates.[11] An operator with (i) a current, *i.e.*, March 31, 1994, rate level below the benchmark rate level or (ii) a current rate level above the benchmark rate level but with a full reduction rate level below the benchmark, is a low-priced operator.[12] The low-priced operator with a current rate level below the benchmark generally does not have to reduce its rate level, and the low-priced operator with a current rate level above the benchmark rate level but with a full reduction rate level below the benchmark is required to reduce its rate level only to the benchmark.[13]

8. Included among the variables used in the benchmark formula is the number of regulated non-broadcast channels per tier. FCC Form 1200 instructs the operator to indicate in Module C, Line C2, the number of regulated non-broadcast channels per tier as of March 31, 1994. FCC Form 1200 defines non-broadcast channels as "channels other than broadcast signals that are receivable off the-air by the cable system. For purposes of this definition, broadcast signals received via satellite or relayed to the cable system via microwave *and* not receivable off-the-air by the cable system are considered non-broadcast signals."[14] According to the City's consultant, classifying KTBN as a broadcast channel as opposed to a non-broadcast channel has the effect of reducing Sammons' basic service tier rates.[15]

9. According to the City, Sammons counted local station KTBN as a non-broadcast channel on its Form 1200,[16] which the City contends is inconsistent with FCC instructions for Line C2, which provide that a channel is not a non-broadcast channel if it is also "receivable off-the-air by the cable system."[17] The City and its consultant told Sammons that it appeared to them that KTBN can be received off-the-air by Sammons' cable system in the City. The City then requested that Sammons provide justification for its designation of KTBN as a non-broadcast channel on its Form 1200. Sammons responded, but the City asserts that Sammons' response was inadequate since it did not address the specific instructions to Line C2 of Form 1200, but rather was an historic commentary regarding the history of reception problems relating to KTBN. According to the City, it made further requests for justification, but Sammons' responses continued to be inadequate.[18] The City charges that Sammons failed to provide reasonable proof that KTBN could not be received off-the-air by its cable system at the time of the Form 1200 filing.

10. Sammons, on the other hand, argues that the City, in its rate order, incorrectly found that KTBN should be classified as a broadcast channel. Sammons maintains that it properly counted KTBN as a non-broadcast channel since KTBN was received by its system via satellite and it was not aware that its system could receive the signal off-the-air at the time it filed Form 1200. Sammons argues that because KTBN did not provide good quality off-the-air signal in the past, its determination that KTBN would not

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92-266, 9 FCC Rcd 4119 (1994) (*"Second Recon. Order"*).

[9] At the time of the local rate order, a so-called "small operator" could elect "transition relief," which allowed it to keep its regulated revenue at its March 31, 1994 levels, and so was not required to complete its benchmark in Module C and its provisional rates were determined by completion of Module D. Pursuant to the Commission's Sixth Report and Order and Eleventh Order on Reconsideration in MM Docket Nos. 92-266 and 93-215, FCC 95-196, at ¶ ¶ 40-42 (released June 5, 1995) (*"Small Systems Order"*), small systems eventually will have to convert to some other form of regulation, *i.e.*, by establishing rates in accordance with our benchmark or cost-of-service rules (the latter of which include the small system cost-of-service regulations adopted in the *Small Systems Order*).

[10] *See Second Recon. Order*, 9 FCC Rcd at 4177-4178.

[11] *See* 47 C.F.R. § 76.922.

[12] *Id.*

[13] *Id.*

[14] FCC Form 1200 at 16 (emphasis added). A Benchmark Fact Sheet further explaining our instructions for calculating an operator's benchmark rate restates this instruction. *See* Fact Sheet, *Benchmark Fact Sheet* at 1-2 (April 29, 1994).

[15] The City's consultant notes in its report that designating local station KTBN as a broadcast channel, as opposed to Sammons' designation of it as a non-broadcast channel, "would have the impact of reducing the rates for Basic Service (Lifeline) by $0.08 per month and Tier 2 (Tier) by $0.07 per month." Appeal, Exhibit D (TMC Report at 3).

[16] *See* Appeal, Exhibit D (TMC Report at 3). KTBN is channel 12 in Sammons' channel line up, and is channel 40 off-the-air. *Id.*

[17] *See* note 14, *supra*.

[18] *See* Opposition at 3-6.

be receivable off-the-air at the time it filed Form 1200 was reasonable. Sammons, however, notes in its Appeal that, it "has since learned, after experiencing quality problems with the satellite feed, that KTBN's off-the-air signal quality has improved. Accordingly, in November of 1994 Sammons switched its carriage of KTBN to the off-the-air signal."[19] Nevertheless, Sammons insists that it properly listed KTBN as a non-broadcast channel on its Form 1200 since, at the time of the Form 1200 filing, KTBN was received by Sammons via satellite.

11. We find that the City's decision is consistent with our instructions for Line C2 of Form 1200 and reasonable. The Form's instructions provide that a channel is not classified as a non-broadcast channel if it can also be received off-the-air by the cable system, notwithstanding that it is a broadcast signal actually received via satellite by the system.[20] Based on the evidence in the record, we conclude that it was not unreasonable for the City to find that Sammons did not provide adequate proof that KTBN could not be received "off-the-air" by its cable system. There is nothing in the record to indicate that Sammons presented any evidence as to whether KTBN could be received over the air in March, 1994. We will, therefore, affirm the City's rate order on this issue.

B. Must-Carry

12. Sammons asserts that the rate order should be overturned on the ground that mandatory carriage of KTBN, which is required under the Commission's must-carry rules, is unconstitutional. The must-carry provisions of the 1992 Cable Act require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations.[21] The constitutionality of the must-carry provisions of the 1992 Cable Act is the subject of continuing litigation in the federal courts.[22] While the case is pending, the must-carry provisions of the 1992 Cable Act remain in effect, as do the Commission's must-carry rules. Despite that, Sammons appears to request in its appeal that we remand the rate order back to the City, given the pending legal challenge to the must-carry rules, on the theory that if the must-carry rules are declared unconstitutional by the federal courts, then Sammons would not incur any refund liability. The result that Sammons envisions with respect to the existing litigation surrounding the must-carry rules, however, is mere speculation. We must base our decision on the applicable laws that are currently in effect. Additionally, no court of competent jurisdiction has ordered the Commission to stay the enforcement of the must-carry rules. We will therefore deny Sammons' request with respect to this issue.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that Sammons Communications, Inc.'s appeal of the local rate order of the City of Burbank, California IS DENIED.

14. IT IS FURTHER ORDERED that the Request for Stay of the City of Burbank's rate order filed by Sammons Communications, Inc. IS DISMISSED as moot.

15. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[19] Appeal at 7 n.4.
[20] *See* paragraph 8, *supra*.
[21] *See* Communications Act, §§ 614-615, 47 U.S.C. §§ 534-535.
[22] *See* Turner Broadcasting Systems, Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993), *vacated*, 114 S. Ct. 2445 (1994) (case remanded to three-judge panel of the U.S. District Court for the District of Columbia for further proceedings).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

TCI TKR OF HOUSTON

Appeal of Local Rate Order
of City of
League City, Texas

ORDER

Adopted: July 18, 1995; Released: July 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On May 15, 1995, TCI TKR of Houston d/b/a/ TCI Cablevision of Houston ("TCI-H"), filed with the Commission an appeal ("Appeal") of the local rate order ("local order") adopted by the City of League City, Texas (the "City") on April 13, 1995.[1] In its local order, the City denied a proposed rate increase sought by TCI-H. In its Appeal, TCI-H argues that the City failed to provide a written decision which comports with Commission requirements.

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[2] In ruling on appeals of local rate orders, the Commission will not conduct a de novo review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[3] The Commission will reverse a franchising authority's decision only if it is determined that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[4] If the Commission reverses a franchising authority's decision, it will not substitute its own decision, but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[5]

II. DISCUSSION

3. The City, by resolution dated April 13, 1995, denied a proposed rate increase sought by TCI-H in its FCC Form 1210 filing.[6] The City's written decision consists of a one-page document that merely states that the City denies TCI-H's proposed rate increase. The local order does not state why the City found TCI-H's proposed rates to be unreasonable. In rate regulation proceedings, the cable operator bears the burden of proving the reasonableness of all of its proposed regulated rates.[7] The local franchising authority, however, must provide the cable operator with an opportunity to participate in the rate review proceedings and to provide documentation supporting its proposed rates.[8] While a local franchising authority is free to seek the assistance of a consultant to review and verify the information presented in an operator's rate justification filings, nothing in our rules requires the local franchising authorities to do so. Similarly nothing in our rules requires a local franchising authority to provide cable operators with reports and calculations that it may have relied upon in rendering its rate decision. If the local franchising authority determines that the operator's proposed rate exceeds the maximum permitted level as defined by the Commission's rate standards, it may prescribe ap rate different from the proposed rate provided that, after giving the operator an opportunity to participate, the local franchising authority explains in a written decision why the operator's rate is unreasonable and why its prescribed rate is reasonable.[9]

4. In order to comply with our rules, the City's rate order should have contained such an explanation.[10] Since it appears from the record below that the City's written decision did not comport with our rules in this area, we remand this case for further proceedings consistent with this decision.[11]

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[1] The City did not file an opposition to the Appeal.

[2] *See* 47 C.F.R. § 76.944.

[3] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket No. 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation & Buy-Through Prohibition, Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[4] *Id.*

[5] *See Rate Order*, 8 FCC Rcd at 5732; *See also Third Reconsideration Order*, 9 FCC Rcd at 4346.

[6] *See* Appeal, Exhibit A. FCC Form 1210 is used by cable operators to adjust their maximum permitted rates based upon changes in the number of regulated channels and to permit operators to pass through certain external costs and inflation to their subscribers. Cable operators must file FCC Form 1200 before they can file the Form 1210. *See* Instructions For FCC Form 1210 Updating Maximum Permitted Rates For Regulated Cable Services.

[7] *See* 47 C.F.R. § 76.937; *See also* Sammons Communications, Inc., DA 95-194 (Cities of Burbank and Glendale, CA), at ¶ 14 (Cab. Serv. Bur., released February 10, 1995).

[8] *See Rate Order*, 8 FCC Rcd at 5723-5724.

[9] *Id.*

[10] *See Rate Order*, 8 FCC Rcd at 5723-5724; *See also* Falcon Cablevision, DA 95-1178 (Warrensburg, MO) at ¶ 12 (Cab. Serv. Bur., released June 1, 1995) and Chillicothe Cablevision, Inc., DA 95-479 (Washington Court House, OH) at ¶ 9 (Cab. Serv. Bur., released March 14, 1995).

[11] TCI-H has requested that, as a remedy for the City's actions, we permit its proposed rates to go into effect subject to any refund liability that may be later imposed by the City. Such a remedy is inappropriate for the Bureau to impose in this case and we decline to do so. We are remanding the case to the City in order to permit it to comply with our rules governing written decisions by local franchising authorities. Existing rates remain in effect until such time as the City approves TCI-H's proposed rates. *See* 47 C.F.R. § 76.942. Since the City has already reviewed TCI-H's Form 1210 filing, it should take the City no longer than 30 days to issue a written decision which complies with Commission rules.

III. ORDERING CLAUSE

5. Accordingly, IT IS ORDERED that TCI-H's Appeal of the local order of the City of League City, Texas, is hereby REMANDED to the City for further proceedings consistent with this Order.

6. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Relief of
TV-24 SARASOTA, INC.

vs. CSR 4178-L

COMCAST CABLEVISION OF WEST
FLORIDA, INC.

For Leased Access Channels

ORDER

Adopted: July 18, 1995; Released: July 24, 1995

By the Chief, Cable Services Bureau

1. By Memorandum Opinion and Order, DA 94-1595, released December 27, 1994 (herein "Order") in this proceeding, the respondent, Comcast Cablevision of West Florida, Inc., (herein "Comcast") was ordered to file with the Commission all contracts for programming in effect for the calendar year prior to December 1993, the number of subscribers for the Sarasota, Florida system as of December 31, 1993, and any other relevant documentation, that it used to justify the calculation of the maximum monthly implicit net fee for leased access, as provided in Section 76.970 of the Commission's rules, 47 C.F.R. § 76.970. The purpose of that requirement was to confirm the monthly price that Comcast pays to carry the programming of nonaffiliated programmers on its system, information which had not been provided for the record and which was necessary to our determination whether Comcast's quoted maximum monthly rate are reasonable in accordance with our rules. *See* Order at ¶ 21-23.

2. On January 17, 1995, Comcast, by a letter of that same date, submitted additional information in justification of its leased access rates along with copies of several contracts with unaffiliated program suppliers. Comcast requested that the programming contracts be withheld from public inspection pursuant to Section 0.459(a) of the Commission's rules, 47 C.F.R. § 0.459(a). Comcast served a copy of its January 24, 1995 letter on TV-24 Sarasota, Inc., the petitioner, by letter dated January 24, 1995. No response from TV-24 Sarasota, Inc. to the information submitted with the Comcast letter has been received by the Commission.

3. We find that the information submitted by Comcast with its letter of January 17, 1995 confirms the monthly payment that Comcast was making to at least one of its nonaffiliated program suppliers is zero, as used in its rate calculations. Based on that information, we further find that Comcast had calculated its maximum monthly rate, as described in Paragraph 21 of the Order, in accordance with Section 76.970(c) of the Commission's rules and that such rate does not exceed the maximum reasonable rate permitted by Section 76.970.

4. Accordingly, IT IS ORDERED that this proceeding IS HEREBY TERMINATED.

5. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HENRY COUNTY BOARD OF EDUCATION
Ariton, Alabama — File No. BPLIF-920506DH

DOTHAN CITY BOARD OF EDUCATION
Dothan, Alabama — File No. BPLIF-920219DC

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1-D4

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 1995; Released: July 24, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Henry County Board of Education (Henry) and Dothan City Board of Education (Dothan City), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the areas of Ariton and Dothan, Alabama, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. *See* 47 C.F.R. Section 74.932 (a)(1)-(5). Both applicants are qualified to be ITFS licensees. Henry and Dothan City are school districts that are accredited by the Southern Association of Colleges and Schools and that propose to serve the formal educational needs of students enrolled in schools located within and outside their respective jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant in predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants areawarded points based on the following criteria:

Localism. Henry and Dothan City are entitled to four points for being school districts proposing to provide formal educational programming to students at schools located within their jurisdictions.

Accreditation. Both applicants are entitled to three points because they are accredited by the Southern Association of Colleges and Schools.

Four-Channel Limitation. Neither applicant is the current licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in an illustrative program schedule and a programming "grid." Henry's grid and schedule propose an average of 24.375 hours of formal educational programming per channel per week. Dothan City's grid and schedule propose an average of 21 hours of formal educational programming per channel per week. Thus, Henry and Dothan City are entitled to one programming merit point apiece.

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither applicant is entitled to the one point for such applicants.

Total. Henry and Dothan City are each entitled to a total of ten points: four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service-Third Report and Order in MM Docket No. 83-523*, (*Third Report and Order*), 4 FCC Rcd 4830 (1989); *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990) (*Third Report Recon.*); and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma, or a legally required certification or license.[3] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each to determine the tentative selectee.

6. Dothan City has provided documentation showing that a total of 21,832 students will be served at its receive sites which are located both within and outside its jurisdiction. Henry claims that a total of 14,009 students will be served at its specified receive sites. However, Henry has not submitted the requisite letters of intended use for those receive sites outside its jurisdiction. Consequently, Henry can be credited only with 2,218 students, the number enrolled in the schools within its jurisdiction. Because the numbers of students credited to Henry, 2,218, is less than 80 percent of the number of students credited to Dothan City, 21,832, Dothan City will be authorized to operate facilities on Channels D1-D4 and the application of Henry will be denied.

OTHER MATTERS

7. Dothan City proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931, and has submitted a copy of its lease with Wiregrass Cable Television. The lease, however, does not entirely conform to the Commission's requirements. Specifically, it does not provide for the licensee's right to purchase the ITFS equipment at its fair market value in the event the lease is terminated. We have consistently maintained that the licensee be permitted to purchase the ITFS equipment necessary to maintain its operation in the event of any action on the lessee's part which would terminate the lease arrangement. See *Turner Independent School District*, 8 FCC Rcd 3153, 3155 (1993). Although inconsistent with our requirements for excess capacity leases, the lack of such a provision in Dothan City's lease neither reflects on the applicant's basic or comparative qualifications, nor precludes a grant of an authorization. Nevertheless, the authorization of Dothan City will be conditioned upon conformity of the lease to Commission requirements. See *Barbour County Board of Education*, 10 FCC Rcd 676, 677 (1995).

8. No petitions to deny or informal objections have been filed against Dothan City's application, and we find Dothan City fully qualified to be an ITFS licensee. We also conclude that grant of Dothan City's application would serve the public interest, convenience, and necessity.

9. Accordingly, IT IS ORDERED, That the application of Henry County Board of Education (BPLIF-920506DH) IS DENIED, and the application of Dothan City Board of Education (BPLIF-920219DC) IS GRANTED, subject to the following:

> Dothan City Board of Education shall, within 30 days of the release of this Order, submit for approval by the Chief, Distribution Services Branch, information demonstrating compliance with the Commission's requirements, including, if appropriate, an amended excess capacity lease conforming in the manner discussed herein.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report Recon.*, 5 FCC Rcd at 945. Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from these receive sites indicating an intention to use the proposed service. *Third Report and Order*, 4 FCC Rcd at 4832; 47 C.F.R. Section 74.911(c). Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's program offerings have been viewed and that such programming will be incorporated into the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and indicate the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Lindsay Independent School District Lindsay, Oklahoma	File No. BPLIF-910906DA
Pauls Valley Public Schools Lindsay, Oklahoma	File No. BPLIF-911011DH

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1, D2, D3, and D4

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 1995; Released: July 24, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Lindsay Independent School District (Lindsay ISD) and Pauls Valley Public Schools (Pauls Valley), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in Lindsay, Oklahoma.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Lindsay ISD and Pauls Valley are school districts that are accredited by the Oklahoma State Department of Education and that are proposing to serve the formal educational needs of students enrolled at schools both within and outside their jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Pauls Valley and Lindsay ISD are awarded points based on the following criteria:

Localism. Both applicants are entitled to four points for being school districts engaged in the formal education of students enrolled at schools within their respective jurisdictions.

Accreditation. Each applicant, accredited by the Oklahoma State Department of Education, is entitled to three points for accreditation.

Four-Channel Limitation. Neither applicant is the licensee of, nor has filed applications for, additional for ITFS facilities in its proposed service area. Thus, each applicant is entitled to the two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid". Pauls Valley's program grid and illustrative schedule propose an average of 24.375 hours of formal educational programming per channel per week. Therefore, Pauls Valley is entitled to one programming merit point. In contrast, Lindsay ISD's program grid and illustrative schedule propose only an average of 20 hours of formal educational programming per channel per week. Because the amount of programming proposed does not reach the threshold amount at which merit points are awarded, Lindsay ISD is not entitled to any programming merit points.

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

E- and F- Channel Group Relocations. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither applicant is entitled to the one point for such applicants.

Total. Lindsay ISD is entitled to a total of nine points: four points for being local; three points for being accredited; and two points for observing the four-channel limitation. Pauls Valley is entitled to a total of ten points: four points for being local; three points for being accredited; one point for proposing an average of at least 21 hours of formal ITFS programming per channel per week; and two points for observing the four-channel limitation. Thus, Pauls Valley is the tentative selectee.

OTHER MATTERS

5. Pauls Valley proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Pauls Valley has submitted a copy of its lease with Ruralvision Central, Inc., which conforms in all respects with the Commission's requirements.

6. No petitions to deny or informal objections have been filed against Pauls Valley's application, and we find Pauls Valley fully qualified to be an ITFS licensee. We also conclude that grant of Pauls Valley's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Lindsay Independent School District (BPLIF-910906DA) IS DENIED, and the application of Pauls Valley Public Schools (BPLIF-911011DH) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NORTHWESTERN STATE UNIVERSITY OF LOUISIANA
Natchitoches, Louisiana — File No. BPLIF-931229GS

MARTIN HIGH SCHOOL
Natchitoches, Louisiana — File No. BPLIF-931230HH

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1-D4

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 1995; Released: July 24, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Northwestern State University of Louisiana (Northwestern) and Martin High School (Martin), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in Natchitoches, Louisiana.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Northwestern and Martin are educational institutions that are accredited by the State of Louisiana and that are proposing to serve their own students.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order), 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Northwestern and Martin are entitled to four points for being educational institutions proposing to serve the formal educational needs of their own enrolled students.

Accreditation. Both applicants are entitled to three points because they are accredited by the State of Louisiana.

Four-Channel Limitation. Neither applicant is the current licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. The Commission's primary focus in evaluating an ITFS applicant's programming proposal is directed to the illustrative schedule and programming grid wherein the applicant details the formal educational and other ITFS programming it intends to provide. Thereafter, we look to any excess capacity lease agreement to ensure that the amount of programming to be transmitted, that is credited to the applicant, is demonstrably permitted under the lease. See Espanola Public Schools, 10 FCC Rcd 919 (1994). Northwestern's illustrative schedule and programming grid propose an average of 45 hours of formal educational programming per channel per week, an amount permitted under its lease agreement. Thus, Northwestern is entitled to two programming merit points. In contrast, Martin's illustrative schedule and programming grid propose an average of 42 hours of formal ITFS programming per channel per week. However, Mar-

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. Second Report and Order, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

tin's excess capacity lease limits the number of formal educational programming hours to 12 per channel per week during the first two years. Since the amount of programming allowable under Martin's lease agreement does not establish the threshold amount at which merit points are awarded, Martin is not entitled to any programming merit points. See Harlem Consolidated School District #122, 9 FCC Rcd 7927 (1994).

E- and F-Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither applicant is entitled to the one point for such applicants.

Total. Northwestern is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Martin is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. Thus, the tentative selectee is Northwestern.

OTHER MATTERS

5. Northwestern proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931, and has chosen Aerie Communications, Inc. (Aerie) to be its excess capacity lessee. Northwestern has submitted a copy of its lease with Aerie, but the lease fails to conform entirely to the Commission's requirements. Although the lease provides for consultation with the licensee regarding the location of the transmission point, another provision in the lease gives Aerie the authority to dictate a change of that site regardless of the service provided to the receive sites of the licensee. We view this as inconsistent with the ITFS licensee's responsibility to ensure the adequacy of its service. Second Report and Order, 101 FCC Rcd at 90. Although inconsistent with our requirements for excess capacity leases, this provision neither reflects adversely on the applicant's basic or comparative qualifications, nor precludes grant of the authorization. Nevertheless, the authorization of Northwestern will be conditioned upon conformity of its lease to the Commission's requirements. See Van Vleck Independent School District, 7 FCC Rcd 7231, 7233 (1992).

6. No petitions to deny or informal objections have been filed against Northwestern's application, and we find Northwestern fully qualified to be an ITFS licensee. We also conclude that grant of Northwestern's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Martin High School (BPLIF-931230HH) IS DENIED, and the application of Northwestern State University of Louisiana (BPLIF-931229GS) IS GRANTED, subject to the following:

> Northwestern State University of Louisiana shall, within 30 days of the release of this Order, submit for approval by the Chief, Distribution Services Branch, information demonstrating compliance with the Commission's requirements, including, if appropriate, an amended excess capacity lease conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DUCHOSSOIS COMMUNICATIONS
COMPANY OF CALIFORNIA, INC.
Assignor

and File No. BALH-920925GU

THE BROWN ORGANIZATION
Assignee

For Assignment of License of
KQPT(FM), Sacramento, California

MEMORANDUM OPINION AND ORDER

Adopted: July 10, 1995; Released: July 24, 1995

By the Commission:

1. On February 12, 1993, the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, denied a Petition to Deny filed November 5, 1992, by Royce International Broadcasting Company ("Royce"), licensee of KWOD(AM), Sacramento, California, against the above-captioned application for assignment of the license of KQPT(FM) from Duchossois Communications Company of California, Inc. to The Brown Organization ("Brown") and granted the subject application. Thereafter, Royce filed a petition for reconsideration of the action denying its petition to deny. On March 23, 1995, the Chief, Audio Services Division, Mass Media Bureau denied Royce's petition for reconsideration, finding that Royce had failed to demonstrate that the denial was in error or that new facts or changed circumstances warranted reconsideration. Royce has requested review of the Bureau's decision.[1]

2. Royce asserts in its application for review that the Bureau committed prejudicial procedural error by granting the assignment of the KQPT(FM) license to Brown without holding a hearing to determine whether grant of the license assignment was consistent with Section 73.239 of our Rules which provides that no license may be granted to any person who controls a unique tower site and restricts access to that site in a manner that limits the number of FM broadcast stations or unduly restricts competition.[2] Royce argues that a hearing is required based on an allegation that Brown intends to evict Royce from the antenna site ("White Rock site") that Brown will control by virtue of the grant of the assignment of the KQPT(FM) license. In this regard, Royce argues that the Bureau's actions render unenforceable the provisions of 47 C.F.R. § 73.239. We have reviewed the Bureau's decision in this matter and find that the Bureau's ruling was correct and that no basis exists to warrant reversal.

3. Royce's application for review relies on questions of law that the Bureau was not given an opportunity to consider. Royce argues that the Commission is obligated to hold a hearing to determine whether Brown intends to violate the provisions of Section 73.239 in the future. In this regard, Royce points to the Commission's past practice of inquiring, in a hearing, into whether an applicant intends to implement its integration pledge. Royce reasons by analogy that if the intention to disregard an integration pledge can lead to the denial of an application for a construction permit, then the intention of the proposed assignee to evict a tenant from its antenna tower is also a relevant inquiry to be made in a hearing. To the extent that Royce has raised a new argument, its application for review is subject to dismissal on procedural grounds. *See* 47 C.F.R. § 1.115(c); *Big Pine Broadcasting, Inc.*, 10 FCC Rcd 1578 (1995). In any event, even considering the argument on its merits, we find it unpersuasive.[3] When there are two or more *bona fide* mutually exclusive applicants for a license, the Commission is required by 47 U.S.C. § 307 to consider those applications in a comparative hearing. *See Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945). The instant proceeding, however, does not involve mutually exclusive applications for new broadcast facilities. Rather, we are considering an application to assign the license of KQPT(FM). Under these circumstances, we are obligated by 47 U.S.C. § 309(e) to hold a hearing only if there is a substantial and material question of fact presented or the Commission cannot otherwise determine that grant of the application would serve the public interest.

4. We find no such issue here. We agree with the Bureau's determination that Royce's assertion that Brown intends to evict KWOD(FM) from the White Rock site, based on a statement from an unnamed source, is undocumented and speculative. Royce has failed to meet its burden under Section 309(d) of presenting specific allegations of fact

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[1] The following pleadings are before the Commission for consideration: an Application for Review, filed April 24, 1995 by Royce; an Opposition to the application for review filed May 9, 1995 by Duchossois Communications Company of California, Inc.; an Opposition to the application for review filed May 9, 1995 by The Brown Organization; and a Reply filed May 22, 1995 by Royce.

[2] 47 C.F.R. § 73.239, Use of Common Antenna Site, provides:

> No FM broadcast station license or renewal of FM broadcast station license will be granted to any person who owns, leases, or controls a particular site which is peculiarly suitable for FM broadcasting in a particular area and (a) which is not available for use by other FM broadcast station licensees; and (b) no other comparable site is available in the area; and (c) where the exclusive use of such site by the applicant or licensee would unduly limit the number of FM broadcast stations that can be authorized in a particular area or would unduly restrict competition among FM broadcast stations.

[3] The criteria used to evaluate competing applicants for the same broadcast license are enunciated in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). However, the integration criterion has been invalidated, and the Commission has been directed to evaluate applications free of the integration criterion. *See Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. Thus, no hearing is required. *Astroline Communications Company v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Moreover, we note that the assignment of the license of KQPT(AM) to Brown was consummated on March 22, 1993 and that Brown now controls the master lease for the White Rock site. Brown has not evicted Royce, and Royce is still a tenant at the White Rock site.

5. Furthermore, even if Royce had documented its assertion that Brown intends to evict KWOD(FM), Royce has failed to demonstrate that the unique site rule is applicable to the White Rock site. All three elements of Section 73.239, the unique antenna site rule, must be be satisfied before the rule is applicable to an FM licensee. *See, e.g., D & D Broadcasting, Inc.*, 7 FCC Rcd 8082 (1992). The first element of the unique site rule, Section 73.239(a), requires a showing that the White Rock site is not available for use by other FM broadcast station licensees. The White Rock site is presently used by four FM broadcast stations, including Royce's station KWOD(FM). Consequently, Royce has not met its burden under Section 73.239(a), and Section 73.239 imposes no obligation on Brown to grant Royce access to the White Rock site. *Id.* Although we need not address the other elements of the unique antenna site rule, we nonetheless note that the third element of the rule, Section 73.239(c), requires that exclusive use of the tower would restrict FM broadcast service in the area or otherwise limit competition among FM broadcast stations. Royce acknowledges that there are nine FM broadcast stations serving Sacramento, and thus the market is served by a substantial number of FM broadcasters. *See D & D Broadcasting, Inc.*, 7 FCC Rcd at 8084; *K-W TV, Inc.*, 7 FCC Rcd 3617, 3620 (1992). Thus, Royce has also failed to meet its burden under Section 73.239(c). *See D & D Broadcasting, Inc.*, 7 FCC Rcd at 8084.

6. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed on April 24, 1995 by Royce International Broadcasting, Inc. IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-122

In the Matter of

Amendment of Section 73.202(b), RM-8513
Table of Allotments,
FM Broadcast Stations.
(Atlantic and Glenwood, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 14, 1995; Released: July 25, 1995

By the Chief, Allocations Branch:

1. At the request of Valley Broadcasting, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 6138 (1994), proposing the reallotment of Channel 279C from Atlantic to Glenwood, Iowa, and the modification of Station KXKT's license to specify Glenwood as its community of license, pursuant to Section 1.420(i) of the Commission's Rules. Comments were filed by the petitioner stating its intention to apply for the channel, if allotted, and by Wireless Communications Corp. ("Wireless").[1] Reply comments were filed by the petitioner.[2]

2. As stated in the *Notice*, the allotment of Channel 279C to Glenwood could provide the community with its first local aural transmission service without depriving Atlantic of its sole local aural transmission service. However, petitioner was requested to provide a study showing what areas and populations would gain and lose reception service. Further, because the transmitter site proposed by the petitioner is but 3 kilometers (1.9 miles) from the Omaha Urbanized Area, petitioner was also requested to specify what portion of the population gain is the result of coverage of the Omaha Urbanized Area.

3. In response, petitioner states that the reallotment of Channel 279C would permit Station KXKT to serve an additional 63,248 persons, none of whom are encompassed within the Omaha Urbanized Area, since the station already provides all of the Omaha Urbanized Area with a 1 mV/m signal. While the reallotment would also result in a loss of service to 39,851 persons, petitioner states that the entire loss area will continue to receive service from at least five allocated or authorized aural services.

4. Petitioner argues that the reallotment of Channel 279C to Glenwood, a community of 4,571 persons, would result in a preferential arrangement of allotments. It again states that Glenwood, which is located 20 miles from Omaha, is the seat of Mills County, with its own municipal government, police and fire departments, post office and zip code, schools and businesses. Further, it states that Glenwood is not included in the Omaha telephone directory, pointing out that Glenwood residents and businesses can reach Omaha telephone numbers only by placing a long distance telephone call. Therefore, it contends that Glenwood is a separate community deserving of its first local aural transmission service. Atlantic, with a 1990 U.S. Census population of 7,432 persons, would continue to receive local aural transmission service from AM Station KJAN.[3]

DISCUSSION

5. We believe the public interest would be served by reallotting Channel 279C from Atlantic to Glenwood as it would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). Under those procedures, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities.[4]

6. The allotment of Channel 279C would provide Glenwood with its first local aural transmission service, thus triggering priority three while Atlantic already has a local aural transmission service, thus falling under priority four. Further, a staff engineering review of the proposal shows that the allotment of Channel 279C to Glenwood would enable Station KXKT to provide service to an additional 56,169 people. While the reallotment would also cause a loss of service to 40,836 people, we note that, with the exception of 1,636 people, all of the loss area will continue to receive service from at least five full-time aural stations. Further, the 1,636 persons who will not receive five full-time services will receive four such services. We have also confirmed that Station KXKT presently serves all of the Omaha Urbanized Area with a 60 dBu signal and 90% of the Urbanized Area receives a 70 dBu signal. We recognize that reallotting Channel 279C to Glenwood

[1] Wireless' comments also included a "counterproposal" requesting the allotment of Channel 239C3 to Atlantic. Because there is no technical conflict between the allotment of Channel 239C3 to Atlantic and the allotment of Channel 279C to Glenwood, this is not an acceptable counterproposal. However, we have confirmed that Channel 239C3 can be allotted to Atlantic in compliance with the Commission's minimum distance separation requirements. Therefore, the proposed allotment of Channel 239C3 will be the subject of a separate *Notice of Proposed Rule Making*.

[2] After the record closed, Stephen O. Meredith ("Meredith"), permittee of Station KSOM(FM), Audubon, Iowa, filed a Motion to Strike and Return as Unacceptable Comments and Counter proposal filed by Wireless to which Wireless responded. We will not accept Meredith's pleading. The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods specified in the *Notice of Proposed Rule Making* and Meredith has provided no justification for his late filing. (We note that Meredith has also provided no information of decisional significance.)

[3] The *Notice* erroneously described Station KJAN as a full-time station. Rather, it is considered to be a daytime-only station since its nighttime power is less than 250 watts.

[4] The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

would result in the removal of Atlantic's sole local nighttime service. However, while we are concerned about the loss of the community's nighttime aural service, this concern is eased by the fact that Atlantic will continue to receive nighttime service from at least five stations, AM Station KJAN does provide some nighttime service and Station KJAN has petitioned to have Channel 239C3 allotted to Atlantic (RM-8573). As proposed, we will also modify Station KXKT's license to specify Glenwood as its community of license.

TECHNICAL SUMMARY

7. Channel 279C can be allotted to Glenwood in compliance with the Commission's minimum distance separation requirements with a site restriction of 24.6 kilometers (15.3 miles) north to accommodate petitioner's desired transmitter site.[5]

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 8, 1995,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Atlantic, Iowa	--
Glenwood, Iowa	279C

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Valley Broadcasting, Inc., for Station KXKT, Channel 279C, IS MODIFIED to specify Glenwood, Iowa, in lieu of Atlantic, Iowa, as its community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Valley Broadcasting, Inc., licensee of Station KXKT, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[5] The coordinates for Channel 279C at Glenwood are 41-15-49 North Latitude and 95-46-21 West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-245

In the Matter of

Amendment of Section 73.202(b), RM-8026
Table of Allotments,
FM Broadcast Stations.
(Frederiksted, Virgin Islands)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 14, 1995; Released: July 25, 1995

By the Chief, Allocations Branch:

1. At the request of Jose J. Arzuaga ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7283 (1992), proposing the allotment of Channel 298A at Frederiksted, Virgin Islands, as its second local FM transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. Opposing comments were filed by St. Croix Wireless Co., Inc. ("Wireless").[1] Reply comments were filed by petitioner, counterproponents, Radio Redentor, Inc. and Carlos J. Colon Ventura. After the pleading cycle closed, Paradise Broadcasting Corporation ("Paradise") filed consolidated reply comments and the counterproponents filed a motion for leave to file supplemental comments.[2] Wireless filed reply comments.[3]

2. In its opposing comments, Wireless states that Frederiksted is an unincorporated town on the island of St. Croix. According to the 1990 U.S. Census, Frederiksted has a population of 1,064. Wireless asserts that the island's population has not grown since the 1980 Census. Wireless claims that a Class A station in the Virgin Islands, which is permitted to operate far in excess of mainland Class A stations, could cover the entire island of St. Croix (population 50,139)[4] with a city grade signal. Therefore, Wireless argues that since 93% of the population lives outside its "towns," the allotment of a new channel at Frederiksted is "meaningless." Wireless states that St. Croix already has seven FM and two AM stations. Thus, by allotting another channel, Wireless claims that the ten stations would, of necessity, be competing for "very limited advertising revenues" and would cause economic hardship. Furthermore, Wireless contends that the over-saturated local aural service is enhanced by a plethora of service from other nearby islands. Accordingly, Wireless urges that petitioner's proposal be denied because of potential competitive and economic hardships on existing stations.[5]

3. In response to Wireless' opposing comments, petitioner argues that Wireless' objection to a new allotment at Frederiksted is "an attempt to limit competition by placing an arbitrary limit to the number of FM outlets on the Island." Petitioner states that Frederiksted is underserved compared to the other U.S. Virgin Islands. Moreover, petitioner concedes that Class A stations in Puerto Rico and the Virgin Islands are permitted to operate in excess of Class A stations on the mainland when terrain conditions have to be considered. Petitioner asserts that difficult terrain conditions affect the reception services received by Frederiksted. Contrary to Wireless' argument of economic hardships in Frederiksted, petitioner contends that due to insurance revenue received because of Hurricane Hugo,

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[1] Comments and a counterproposal were jointly filed by El Mundo Broadcasting Corporation, licensee of Station WKAQ-FM, San Juan, Puerto Rico; Estereotempo, Inc., licensee of Station WIOC-FM, Ponce, Puerto Rico; Radio Redentor, Inc., licensee of Station WERR-FM, Utuado, Puerto Rico; and Aurio Matos, licensee of Station WNNV-FM, Aguada, Puerto Rico ("counterproponents"), proposing the substitution of Channel 287B1 for Channel 288A at Aguada, Puerto Rico, and the modification of Station WNNV(FM)'s construction permit accordingly. Additionally, counterproponents requested the reallotment of Channel 281B from Utuado to Gurabo, Puerto Rico, and the modification of Station WERR-FM's license to reflect the change of community of license. In order to accommodate their proposal, counterproponents proposed the substitution of Channel 285B for Channel 284B at San Juan, Puerto Rico; the substitution of Channel 283B for Channel 286B at Ponce, Puerto Rico; the substitution of Channel 267B for Channel 246B and the substitution of Channel 298B for Channel 282B at Charlotte Amalie, Virgin Islands; the substitution of Channel 300B for Channel 299B at Carolina, Puerto Rico; the allotment of Channel 282A at Frederiksted, Virgin Islands; and the allotment of Channel 274A at Christiansted, Virgin Islands (RM-8183).

Public Notice of the counterproposal was given on February 17, 1993, Report No. 1927. The counterproponents filed identical comments and counterproposal in MM Docket Nos. 92-244, 92-245 and 92-247. After the pleading cycles closed, counterproponents filed a consolidated notice of withdrawal in all three dockets. Accordingly, since the counterproposal (RM-8183) was dismissed in the context of MM Docket No. 92-244, 10 FCC Rcd (1995), responsive pleadings in the instant docket are moot and will not be considered herein.

[2] Counterproponents' supplemental comments opposing petitioner advancing two new counterproposals in his reply comments are moot since the counterproponents have withdrawn their proposal. In any event, the comments advise of matters of which we would take official notice. Accordingly, responsive pleadings thereto will not be discussed in this proceeding.

[3] Wireless' late-filed response concerning false statements in petitioner's reply comments was not accompanied by a motion to accept. The Commission's Rules do not contemplate filing of pleadings beyond the established comment and reply comments periods, unless otherwise specifically requested, as set forth in the *Notice*. Wireless' allegation of petitioner's false statements is unsubstantiated and will not be considered. Furthermore, we find that Wireless' response does not provide the Commission with any information of decisional significance. *See* Section 1.415 of the Commission's Rules.

[4] Population figure taken from the 1990 U.S. Census.

[5] In the alternative, Wireless requests that the Commission delay action on the proposed allotment at Frederiksted until the outcome of a pending petition for rule making (RM-7932) filed by the National Association of Broadcasters, seeking a review of the Commission's commercial FM allotment and licensing policies.

"the Island economy is now booming." Accordingly, petitioner urges that it is in the public interest to allot Channel 298A at Frederiksted as its second local FM transmission service.

4. In its reply comments, petitioner filed counterproposals requesting the allotment of Channel 298B1 at Frederiksted, Virgin Islands, or in the alternative, Channels 298A at Culebra, Puerto Rico, and Channel 299A at Frederiksted, Virgin Islands.[6] To accommodate the alternative allotments, petitioner also proposes the substitution of Channel 300B for Channel 299B at Carolina, Puerto Rico, and the modification of Station WAHQ(FM)'s (formerly WVOZ(FM)) license accordingly. Petitioner states his intention to apply for whatever channels are allotted. We will deny petitioner's requests. First, the proposed allotment of Channel 298B1 at Frederiksted constitutes an untimely filed counterproposal because it seeks the allotment of a higher class channel than proposed in the *Notice*. Section 1.420(d) of the Commission's Rules states that counterproposals must be advanced in initial comments and will not be considered if advanced in reply comments. Second, to accommodate the allotments of Channel 298A at Culebra and Channel 299A at Frederiksted would require the licensee of Station WAHQ(FM) to change frequency.[7] In addition, petitioner's counterproposals either introduce a new community or higher class allotment than proposed in the *Notice*, with the attendant possibility of foreclosing other changes to the Table of Allotments without providing notice to affected parties and an opportunity for such parties to submit comments. Moreover, Commission policy requires reimbursement to affected stations for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1987).

5. Wireless' arguments regarding competitive and economic hardships of a new allotment at Frederiksted raise issues which the Commission has already determined not relevant in either a licensing or allotment context. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied* 4 FCC Rcd 2276 (1989); *Cheyenne, Wyoming*, 8 FCC Rcd 4473 (1993). Consequently, there is no basis under the current state of Commission precedent for consideration of those issues. In a related context, there is no Commission requirement for Jose J. Arzuaga or any other party to demonstrate a "demand" or need for an allotment aside from the already stated willingness of Mr. Arzuaga to apply for the Channel 298A allotment at Frederiksted and construct the proposed facilities. Moreover, because of the action taken in this proceeding, Wireless' economic harm arguments are now moot.

6. IT IS ORDERED, That the petition for rule making filed by Jose J. Arzuaga proposing the allotment of Channel 298A at Frederiksted, Virgin Islands, IS DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[6] Since petitioner's counterproposal for Channel 298B1 at Frederiksted is untimely filed, it will not be considered in the context of this proceeding. *See* Section 1.415 of the Commission's Rules. Further, because petitioner's counterproposal requests a Class B1 channel in lieu of the Class A channel proposed in the *Notice*, petitioner has apparently abandoned his interest in a Class A allotment at Frederiksted. Therefore, since there is no other expression of interest for Channel 298A at Frederiksted, we will dismiss the instant proceeding. However, we will consider petitioner's proposal for Channel 298B1 at Frederiksted in a separate *Notice of Proposed Rule Making*.

[7] As stated above, after the pleading cycle closed, licensee of Station WAHQ(FM) withdrew its request for the substitution of Channel 300B for Channel 299B at Carolina, Puerto Rico. To accommodate petitioner's proposed counterproposals for Class A allotments at Culebra and Frederiksted would require Station WAHQ(FM) to change frequency. Accordingly, petitioner is required to reimburse Station WAHQ(FM) for reasonable and prudent costs of changing frequencies. Petitioner was not aware that Station WAHQ(FM) had withdrawn its request, and consequently, petitioner did not state his willingness to reimburse the station.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-247

In the Matter of

Amendment of Section 73.202(b), RM-8098
Table of Allotments.
FM Broadcast Stations.
(Christiansted, Virgin Islands)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 14, 1995; Released: July 25, 1995

By the Chief, Allocations Branch:

1. At the request of Clayton Knight ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7235 (1992), proposing the allotment of Channel 285A at Christiansted, Virgin Islands, as its fifth local commercial FM transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted.[1] Opposing comments were filed by St. Croix Wireless Co., Inc. ("Wireless").[2] Reply comments were filed by petitioner, counterproponents, Jose J. Arzuaga, and Radio and Redentor, Inc. Consolidated reply comments were also filed by Paradise Broadcasting Corporation ("Paradise"). After the pleading cycle closed, counterproponents filed a motion for leave to file supplemental comments.[3] Wireless filed further reply comments. Petitioner filed responsive reply comments.[4]

2. In its opposing comments, Wireless states that Christiansted is an unincorporated town on the island of St. Croix. Wireless also states that according to the 1990 U.S. Census, Christiansted has a population of 2,555. Wireless asserts that Christiansted has not grown since the 1980 Census. Wireless asserts that a Class A station in the Virgin Islands, which is permitted to operate far in excess of mainland Class A stations, could cover the entire island of St. Croix (population 50,139)[5] with a city grade signal. Wireless argues that since 93% of the population lives outside its "towns," the allotment of a new channel at Christiansted is "meaningless." Christiansted, states Wire-

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[1] Petitioner's late-filed letter expressing his continuing interest in Channel 285A at Christiansted will be accepted since it would be in the public interest and no other expression of interest has been filed. Therefore, the acceptance of petitioner's letter reaffirming his interest in the channel will cause no prejudice to any other party. However, petitioner's informal second "Expression of Interest and Motion to Dismiss" is not filed pursuant to Commission Rules 1.415 and 1.420 and, therefore, will not be considered herein.

We also recognize that petitioner, as requested in the *Notice*, failed to comply with Section 1.52 of the Commission's Rules which states that "[a] party who is not represented by an attorney shall sign and verify the document and state his address. . ." Here, petitioner did sign the petition and state his address but failed to also verify that the statements contained in the petition were true and accurate to the best of his knowledge. However, since Channel 285A can be allotted to Christiansted without conflicting with any other pending request, we believe that the failure of the petitioner to verify his statements should not result in the severe penalty of denying Christiansted its fifth local commercial FM transmission service. Nevertheless, this action should not be construed as releasing parties from the requirements of Section 1.52 of the Commission's Rules. Indeed, were we unable to make this allotment without prejudice to another party, the failure to remedy the omission could well have resulted in dismissal of petitioner's request.

[2] Comments and a counterproposal were jointly filed by El Mundo Broadcasting Corporation, licensee of Station WKAQ-FM, San Juan, Puerto Rico; Estereotempo, Inc., licensee of Station WIOC-FM, Ponce, Puerto Rico; Radio Redentor, Inc., licensee of Station WERR-FM, Utuado, Puerto Rico; and Aurio Matos, licensee of Section WNNV-FM, Aguada, Puerto Rico ("counterproponents"), proposing the substitution of Channel 287B1 for Channel 288A at Aguada, Puerto Rico, and the modification of Station WNNV(FM)'s construction permit accordingly. Additionally, counterproponents requested the reallotment of Channel 281B from Utuado to Gurabo, Puerto Rico, and the modification of Station WERR-FM's license to specify the change of community of license. In order to accommodate their proposal, counterproponents proposed the substitution of Channel 285B for Channel 284B at San Juan, Puerto Rico; the substitution of Channel 283B for Channel 286B at Ponce, Puerto Rico; the substitution of Channel 267B for Channel 246B and the substitution of Channel 298B for Channel 282B at Charlotte Amalie, Virgin Islands; the substitution of Channel 300B for Channel 299B at Carolina, Puerto Rico; the allotment of Channel 282A at Frederiksted, Virgin Islands; and the allotment of Channel 274A at Christiansted, Virgin Islands (RM-8183).

Public Notice of the counterproposal was given on February 17, 1993, Report No. 1927.

Counterproponents filed identical comments and counterproposal in MM Docket Nos. 92-244, 92-245 and 92-247. After the pleading cycles closed, counterproponents filed a consolidated notice of withdrawal in all three dockets. Therefore, since the counterproposal (RM-8183) was dismissed in the context of MM Docket No. 92-244, 10 FCC Rcd (1995), responsive pleadings in the instant docket are moot and will not be discussed herein.

[3] Although counterproponents' supplemental comments were accompanied by a motion for leave to file, the comments advise of matters of which we would take official notice in any event. Therefore, since the supplemental comments would not assist us in reaching a final determination, they have not been accepted for consideration.

[4] The Commission does not contemplate the filing of pleadings after the comment and reply comment periods unless specifically requested, as set forth in the *Notice*. However, we will accept petitioner's late-filed reply comments. Petitioner's allegation of misrepresentation is unsubstantiated and need not be considered. Furthermore, petitioner has not suffered any prejudice thereby. Petitioner's motion to dismiss is moot in light of counterproponents' withdrawal. Wireless' late-filed reply comments need not be addressed since they reiterate earlier comments filed by Wireless.

[5] Population figure taken from the 1990 U.S. Census.

less, already has one AM and six FM stations.[6] Thus, argues Wireless, by allotting another channel at Christiansted would mean one radio station for every 319 residents. Wireless claims that an additional channel on the island would cause the stations, by necessity, to be competing for "very limited advertising revenues" and thus would create economic hardships. Furthermore, contends Wireless, the over-saturated local aural service is enhanced by a plethora of service from other nearby islands. Accordingly, Wireless urges that the Commission deny petitioner's proposal because of the economic impact it would have on existing stations.[7]

3. In its reply comments, Paradise contends that petitioner's statement of continuing interest was more than two weeks late-filed and was neither recorded on the Commission's docket nor available for inspection in the Commission's public reference room. Paradise further claims that it was not served by petitioner. Even if served, Paradise asserts the late filing would have precluded parties from timely filing responsive pleadings. The counterproponents also claim that their search of the official records revealed no statement of continuing interest filed by petitioner, and thus they conclude that one was never filed.[8] Therefore, Paradise and counterproponents urge that since no other party filed a timely expression of interest, and that petitioner's statement of interest was either never or late-filed, the proposal be dismissed. *See* n.1, *supra*.

4. VISC's arguments regarding competitive and economic hardships of a new allotment in Christiansted raise issues which the Commission has already determined not relevant in either a licensing or allotment context. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied* 4 FCC Rcd 2276 (1989); *Cheyenne, Wyoming*, 8 FCC Rcd 4473 (1993). Consequently, there is no basis under the current state of Commission precedent for consideration of those issues. In a related context, there is no Commission requirement for Clayton Knight or any other party to demonstrate a "demand" or need for an allotment aside from the already stated willingness of Mr. Knight to apply for the Channel 285A allotment at Christiansted and construct the proposed facilities.

5. Based on the information before us, we believe the public interest would be served by the allotment of Channel 285A at Christiansted, since it would provide the community with its fifth local commercial FM transmission service. An engineering analysis has determined that Channel 285A can be allotted at Christiansted in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.0 kilometers (5.0 miles) west.[9]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 8, 1995,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Christiansted, Virgin Islands	228B, 236B, 258B, 262B, 285A

7. The window period for filing applications will open on **September 8, 1995,** and close on **October 10, 1995.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[6] Two of the FM stations are for noncommercial educational use.

[7] In the alternative, Wireless requests that the Commission delay action on the proposed allotment at Christiansted until the outcome of a pending petition for rule making (RM-7932) filed by the National Association of Broadcasters, seeking a review of the Commission's commercial FM allotment and licensing policies.

[8] We note that petitioner's certificate of service certifies that a copy of the letter expressing petitioner's continuing interest in the channel was mailed to counsel for counterproponents on January 27, 1993. However, the certificate does not reflect that a copy was mailed to Paradise or its counsel.

[9] The coordinates for Channel 285A at Christiansted are North Latitude 17-45-00 and West Longitude 64-46-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MM Docket No. 92-291

Amendment of Section 73.202(b), RM-8133
Table of Allotments,
FM Broadcast Stations.
(Cambridge and
St. Michaels, Maryland)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 17, 1995; Released: July 25, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a *Petition for Reconsideration*, filed by CWA Broadcasting, Inc. ("CWA") of the *Report and Order* ("R&O"), 9 FCC Rcd 2767 (1994), in the above-captioned docket.[1] CWA requests reconsideration of our action denying its request to reallot Channel 232A from Cambridge, Maryland, to St. Michaels, Maryland.[2] Prettyman Broadcasting Company, Inc. ("Prettyman")[3] filed an opposition to the petition for reconsideration to which CWA filed a reply.

2. At the request of CWA, the *Notice of Proposed Rule Making*, 7 FCC Rcd 8545 (1992), in this proceeding proposed to reallot Channel 232A from Cambridge, Maryland, to St. Michaels, Maryland, and modify the construction permit for Station WFBR accordingly. Upon further review of this proposal, it was determined that it could not be adopted consistent with Commission requirements involving a change of community of license. The *Memorandum Opinion and Order on Reconsideration* in MM Docket 88-526, 5 FCC Rcd 7094, 7097 (1990), states that we will not accept petitions to change the community of license before or during the first year of station operation, when a permittee or licensee received in a comparative hearing a decisionally significant preference that would not have been granted had the comparative contest been for a station at the new proposed community. Recognizing the potential for subversion of the comparative process, the Commission placed the burden on petitioners to address this concern.[4] As pointed out in the *R&O*, CWA was granted a construction permit for Channel 232A at Cambridge as a result of prevailing in a comparative hearing in which the Administrative Law Judge awarded it a "decisive 100% integration credit, enhanced by minority ownership, and past civic activities within the service area." *See Big Bay Broadcasting*, MM Docket 87-421, 4 FCC Rcd 4676, 4678 (1989). The *R&O* denied the change of community.

3. In the petition for reconsideration, CWA argues that the above referenced Commission policy set forth in the *Memorandum Opinion and Order on Reconsideration* in MM Docket 88-526 would not be violated by granting CWA's rulemaking petition because past civic activities in the service area were not decisionally significant in Docket 87-241. Rather, CWA contends that it and another applicant were both tied with 100% credit for integration of ownership and management and that CWA's qualitative enhancements for minority status and past broadcast experience were the decisional factors. CWA does recognize that it also received qualitative enhancements for past civic activities but alleges that only one of these was in the Cambridge area.

4. Prettyman filed a timely opposition to the reconsideration. Prettyman states that CWA raises the same arguments which were considered and rejected by the Commission's staff in the *R&O*. Prettyman points out that CWA now attempts to support changing the community of license by arguing that "community activity" was not "decisionally significant." Prettyman argues that CWA has failed to meet the Commission's standards for reconsideration; that there are no new facts or changed circumstances; and that petitioner simply cannot meet its burden of showing that the reallotment will not subvert the comparative process.

5. After careful consideration of the petition for reconsideration, we find that it should be denied.[5] The *R&O* correctly denied CWA's request to reallot Channel 232A from Cambridge to St. Michaels, Maryland, and to modify the construction permit for Station WFBR to specify the new community of license.[6] As stated in the *Memorandum Opinion and Order on Reconsideration*, we will not accept

[1] Public notice of the petition for reconsideration was given on July 28, 1994, Report No. 2024.

[2] CWA was granted a construction permit for Channel 232A on June 20, 1990 (BPH-851028MJ) and has filed a fourth extension request (BMPH-940509JZ).

[3] Prettyman is the licensee of Station WICO-FM, Channel 232A, Cambridge, Maryland. Station WICO-FM was ordered to operate on Channel 248A in MM Docket 84-1043 to accommodate the allotment of Channel 232A at Cambridge. *See* 50 FR 34466, August 26, 1985. The construction permit for Station WFBR, Channel 232A, Cambridge, is conditioned on Station WICO-FM changing channels. On September 19, 1986, Prettyman Broadcasting was granted permission from the FCC to continue WICO-FM's operations on Channel 232A until a permittee at Cambridge initiated program tests. Prettyman Broadcasting is entitled to reimbursement for changing channels regardless of the outcome of this proceeding.

[4] Petitioners who are permittees or licensees for less than one year were requested to state in their petitions whether they obtained a construction permit in a comparative hearing, and, if so, whether the petitioner sought the type of preference with which we are concerned. *See* para. 21 of the *MO&O on reconsideration* in MM Docket 88-526. We note that CWA failed to address this issue in its petition for rule making.

[5] The dismissal of this proposal makes no determination on St. Michaels' needs for allotment of an FM channel nor does it preclude CWA from requesting a change of community once it has been on the air in Cambridge for a period of one year or more.

[6] We note that although CWA has demonstrated that zoning difficulties render its presently desired site unavailable, it has not demonstrated that this is the only usable site for Channel 232A in Cambridge.

petitions to change the community of license before or during the first year of station operation when a licensee or permittee receives in a comparative hearing a decisionally significant preference that would not have been granted had the comparative contest been for a station at the new proposed community. The record in the hearing proceeding concerning Channel 232A at Cambridge clearly indicates CWA was awarded the construction permit for Channel 232A at Cambridge in a comparative hearing where it received credit for past civic activities. Although it also received qualitative enhancements for minority ownership and past broadcast experience, the past civic activities at Cambridge were also part of this package of qualitative enhancements that were relied upon by the Administrative Law Judge. Therefore, we continue to believe that CWA falls squarely within the Commission's policy requiring denial of its change of community or license proposal.

6. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by CWA Broadcasting, Inc. IS DENIED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-320

In the Matter of

Amendment of Section 73.202(b), RM-8407
Table of Allotments,
FM Broadcast Stations.
(Ellison Bay, Wisconsin)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 17, 1995; Released: July 25, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a Petition for Reconsideration ("reconsideration"), filed by The Eden Broadcast Group ("petitioner") of the *Report and Order* ("R&O"), 9 FCC Rcd 2327 (1994), in the above-captioned docket.[1] The R&O denied the request for allotment of Channel 223A to Ellison Bay, Wisconsin. No comments were received at the Commission in response to the reconsideration.

2. Petitioner requested the allotment of Channel 223A to Ellison Bay, Wisconsin, as that community's first local broadcast service. In response to the petition, a *Notice* was issued proposing the allotment and requesting petitioner to submit information showing how Ellison Bay qualifies as a community for allotment purposes. The R&O denied the requested allotment. Based on the totality of the evidence submitted by petitioner, we found that it had failed to establish that Ellison Bay qualifies as a community for allotment purposes. *See Mokelumme Hill, California*, 4 FCC Rcd 7108 (1989).

3. In its reconsideration, petitioner argues that the R&O erroneously concludes that Ellison Bay is not a community for allotment purposes. According to petitioner, the general information provided regarding the community, although brief, was correct. Petitioner now provides a list of businesses, all with Ellison Bay addresses, and states that the summer population in Northern Door County (Townships of Washington Island and Liberty Grove) exceeds 30,000. Further, Ellison Bay is the geographical center for these two townships.

4. We shall deny the petition for reconsideration on two grounds. First, the petitioner has submitted new matter on the question of whether Ellison Bay is a community but has not demonstrated that this is the type of new matter permitted under Section 1.429 of the Commission's Rules. On the contrary, this new matter, consisting mainly of names and addresses of Ellison Bay businesses, appears to be generally available information that could have been obtained through the exercise of ordinary diligence and submitted at the comment or reply comment stage of this proceeding. Second, the new information does not, in our view, establish that Ellison Bay is a community for allotment purposes. Although the petitioner has specifically identified the names and addresses of various businesses, churches, and civic groups, it has not shown that these social, religious, or commercial organizations have a nexus with the community in question, as required by Commission precedent and noted in the *Report and Order* in this proceeding. *See Marianna, Quincy, and Tallahassee, Florida*, 6 FCC Rcd 633 (1991) and cases cited therein. In particular, it is not clear whether the listed entities are located in the community of Ellison Bay as opposed to the township of Ellison Bay or a larger surrounding area. Indeed, only one business and two civic groups have Ellison Bay in their trade names.

5. In view of the above, IT IS ORDERED, That the petition for Reconsideration filed by The Eden Broadcast Group IS DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Public notice of the Petition for Reconsideration was given on July 28, 1994, Report No. 2024.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-123

In the Matter of

Amendment of Section 73.202(b), RM-8669
Table of Allotments,
FM Broadcast Stations.
(Winona, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 18, 1995; Released: July 25, 1995

Comment Date: September 15, 1995
Reply Comment Date: October 2, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by OARA, Inc. ("petitioner"), requesting the allotment of Channel 274A to Winona, Texas, as the community's first local aural transmission service. Petitioner states it will apply for Channel 274A, if allotted.

2. In support of its proposal, petitioner states that Winona is an incorporated community with its own post office, zip code, fire department and school district. Petitioner also advises that Winona has its own city government and city council, numerous retail establishments, three churches, service businesses and commercial/ industrial establishments, and a chamber of commerce which oversees economic development.

3. We believe petitioner's proposal warrants consideration since it could provide Winona[1] with its first local FM service. Channel 274A can be allotted to Winona in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Winona, Texas	--	274A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 15, 1995,** and reply comments on or before **October 2 , 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ann Bavender
Fletcher, Heald & Hildreth
1300 N. 17th Street, 11th Floor
Rosslyn, Virginia 22209
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pam Blumenthal, Mass , Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] According to the 1990 U.S. Census, Winona is an incorporated community with a population of 457 persons.
[2] The coordinates for Channel 274A at Winona are North Latitude 32-29-22 and West Longitude 95-10-01.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-121

In the Matter of

Amendment of Section 73.202(b), RM-8660
Table of Allotments,
FM Broadcast Stations.
(Dearing, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 18, 1995; Released: July 25, 1995

Comment Date: September 15, 1995
Reply Comment Date: October 2, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by William Bruce Wachter ("petitioner"), requesting the allotment of Channel 251A to Dearing, Kansas, as the community's first local aural transmission service. Petitioner states he will apply for Channel 251A, if allotted.

2. We believe petitioner's proposal warrants consideration since it could provide Dearing[1] with its first local service. Channel 251A can be allotted to Dearing in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Dearing, Kansas	--	251A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 15, 1995,** and reply comments on or before **October 2 , 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, DC 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lauren A. Colby
10 E. Fourth Street
P.O. Box 113
Frederick Maryland 21705-0113
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] According to the 1990 U.S. Census, Dearing is an incorporated community with a population of 428 persons.

[2] The coordinates for Channel 251A at Dearing are North Latitude 37-03-31 and West Longitude 95-42-47.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE SATELLITE
OF SOUTH MIAMI, INC.

Request for Declaratory Ruling

The City of South Miami,
Florida (FL0529), and
Metropolitan Dade County,
Florida (FL0914)

ORDER

Adopted: July 18, 1995; Released: July 25, 1995

By the Chief, Cable Services Bureau:

1. On July 12, 1994, Cable Satellite of South Miami, Inc. ("Cable Satellite") filed a Request for Declaratory Ruling regarding the legitimacy of certain tolling orders issued by the City of South Miami, Florida ("South Miami") and Metropolitan Dade County, Florida (the "County"). South Miami and the County each filed oppositions to Cable Satellite's Request for Declaratory Ruling, to which Cable Satellite filed a consolidated reply. On June 23, 1995, Cable Satellite filed a motion to withdraw its Request for Declaratory Ruling as to both South Miami and the County. Cable Satellite's motion is unopposed.

2. Accordingly, IT IS ORDERED that the Request for Declaratory Ruling filed by Cable Satellite of South Miami, Inc. IS DISMISSED WITHOUT PREJUDICE.

3. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules.[1]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] 47 C.F.R. § 0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE SATELLITE
OF SOUTH MIAMI, INC.

Petition for Revocation

of the Certification of the City of South Miami, Florida to regulate basic cable rates (FL0529)

ORDER

Adopted: July 18, 1995 **Released: July 25, 1995**

By the Chief, Cable Services Bureau:

1. On July 12, 1994, Cable Satellite of South Miami, Inc. ("Cable Satellite") filed a Petition for Revocation challenging the certification of the City of South Miami, Florida ("South Miami") to regulate rates for basic cable service and associated equipment.[1] South Miami filed an Opposition to Petition for Revocation on August 12, 1994, to which the Cable Satellite filed a Reply on August 22, 1994. On June 23, 1995, Cable Satellite filed a motion to withdraw its Petition for Revocation. Cable Satellite's motion is unopposed.

2. Accordingly, IT IS ORDERED that the Petition for Revocation of the certification of the City of South Miami, Florida to regulate basic service rates filed by Cable Satellite of South Miami, Inc. IS DISMISSED WITHOUT PREJUDICE.

3. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules.[2]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] South Miami filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 25, 1993, which became effective on November 24, 1993.
[2] 47 C.F.R. § 0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLEVISION SYSTEMS CORP. and
CABLEVISION SYSTEMS EAST
HAMPTON CORP.

Petition for Reconsideration

of the Certification of
East Hampton, New York
to Regulate Basic Cable Service Rates (NY0149)

MEMORANDUM OPINION AND ORDER

Adopted: July 18, 1995; Released: July 25, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 20, 1993, Cablevision Systems Corporation and Cablevision Systems East Hampton Corporation (collectively "Cablevision") filed a timely Petition for Reconsideration challenging the certification of the Town of East Hampton, New York (the "Town" or "East Hampton") to regulate Cablevision's rates for basic cable service and associated equipment.[1] The Town filed an opposition to Cablevision's petition, to which Cablevision filed a reply. In addition, Cablevision submitted a supplemental pleading on April 22, 1994.[2] The Town did not file a response to Cablevision's supplemental pleading.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, ("Communications Act") allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition. [3] To qualify for certification, a franchising authority must confirm that it has the legal authority and personnel to regulate rates, that it will adopt and administer regulations that are consistent with the Commission's rules, and that interested parties will be provided with a reasonable opportunity to comment during rate proceedings.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6]

II. BACKGROUND

3. On August 20, 1993, the Town commenced revocation proceedings against Cablevision's franchise alleging that Cablevision had committed material breaches of its franchise agreement.[7] On September 28, 1993, Cablevision filed a request with the Town pursuant to Section 625 of the Communications Act for modification of its franchise consistent with the March, 1993 modifications to its basic service tier and cable programming service tier services.[8] On October 1, 1993, the Town announced that it would simultaneously determine Cablevision's franchise modification request and the issue of revocation of Cablevision's franchise. Believing that it was entitled to a final decision on its franchise modification request prior to the initiation of revocation proceedings, Cablevision, on October 5, 1993, brought an action in the United States District Court for

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[1] The Town filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" on September 13, 1993, which became effective October 13, 1993.

[2] Cablevision stated that its supplemental pleading contained new and important information to the resolution of this proceeding. Because the information contained in Cablevision's supplemental pleading did not exist when it filed its petition and bears directly on issues related to this proceeding, we believe that the public interest is served by accepting Cablevision's supplemental pleading.

[3] Communications Act § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] Communications Act § 623(a)(3), 47 U.S.C. § 543(a)(3); 47 C.F.R. § 76.910(b).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* Communications Act § 623(a)(4), 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (" *Rate Order*").

[7] Cablevision's 1985 franchise agreement with East Hampton requires that Cablevision provide a basic service tier consisting of at least 23 channels. On March 15, 1993, Cablevision, purportedly in compliance with the Communications Act and the Commission's basic service rules, altered its basic service tier to include only 10 channels and moved the remaining channels to a cable programming service tier. The new basic service tier, denominated Broadcast Basic service, included all channels required by the Commission's rules. *See* 47 C.F. R. §76.901(a) (basic service requirements). The cable programming service tier was denominated Family Cable service. Cablevision customers which had previously received the 23 channel basic service were given the option of receiving Broadcast Basic or Broadcast Basic and Family Cable. On April 1, 1993, Cablevision increased the rates charged for Family Cable service. The Town asserted that the tier modifications and rate increase each violated the terms of Cablevision's franchise agreement.

[8] *See* Communications Act §625(a)(1)(B), 47 U.S.C. §§545(a)(1)(B). Section 625 of the Communications Act provides that a cable operator may obtain from the franchising authority modifications of the requirements in the operator's franchise ". . . if the cable operator demonstrates that the mix, quality, and level of services required by the franchise at the time it was

the Eastern District of New York[9] pursuant to Sections 625 and 635 of the Communications Act seeking, *inter alia*, a declaration that Cablevision was not in material breach of its franchise, and that its request for a franchise modification be granted.[10] On April 1, 1994, the Town formally revoked Cablevision's franchise and denied Cablevision's franchise modification request. On September 12, 1994, the district court found that Cablevision's actions did not result in material breaches of the franchise agreement, that the Town's revocation of the franchise agreement was improper and contrary to law, and granted Cablevision's franchise modification request.[11] The district court's decision is currently on appeal to the United States Court of Appeals for the Second Circuit. [12]

III. DISCUSSION

4. Cablevision's petition challenges the Town's certification on the grounds that the Town's attempt to revoke Cablevision's franchise violated the terms of its certification. Cablevision claims that the Town revoked its franchise in retaliation for the re-tiering and rate restructuring undertaken by Cablevision in March and April of 1993. Specifically, Cablevision asserts that by filing for certification with the Commission, the Town agreed to ". . . adopt and administer regulations with respect to basic cable service that are consistent with the regulations prescribed by the Commission for regulation of the basic service tier."[13] Cablevision asserts that each of its actions that the Town challenges as material breaches of the franchise agreement was actually taken in full compliance with all applicable laws and regulations. Cablevision claims that the provision in the franchise agreement requiring a minimum of 23 channels on the basic service tier had been preempted by the 1992 Cable Act and therefore was no longer valid. Cablevision also argues that because the Town could no longer require Cablevision to carry channels on its basic service tier beyond those minimum requirements set forth in the 1992 Cable Act and the Commission's rules, the Town could not require Cablevision to maintain the 23 channel basic service requirement. Cablevision also defends as permissible its April, 1993 rate increase. Moreover, Cablevision states that the rate increase affected only the Family Cable tier, a cable programming service tier, and so was not within the purview of local review. In sum, Cablevision claims that the Town's attempt to revoke its franchise agreement is inconsistent with the Commission's regulations and violates the Town's certification requirements.

5. In response, the Town asserts that its decision to revoke Cablevision's franchise does not constitute grounds for rescission of the Town's certification. The Town argues that Cablevision's decision to restructure its rates and retier its channel line-up in March and April of 1993 resulted in material breaches of its franchise agreement and was in violation of then-existing federal cable rate regulations. The Town argues that its actions were justified and proper, and therefore do not constitute grounds for the rescission of its certification.

6. In its supplemental pleading, Cablevision asserts that the Town's April, 1994 revocation of its franchise was based on three grounds. First, Cablevision asserts that the Town determined that Cablevision instituted illegal rate increases in March and April of 1993. Second, it asserts that the Town found that Cablevision improperly eliminated, without the Town's prior consent, a tier of programming mandated by Cablevision's franchise agreement. Finally, it states that the Town concluded that Cablevision failed to provide, in accordance with the franchise agreement, a basic service tier consisting of a minimum of 23 channels. According to Cablevision, the Town claimed that each of these actions resulted in material breaches of Cablevision's franchise agreement and therefore constituted grounds for revocation of Cablevision's franchise.

7. As noted above, a franchising authority's certification may be rescinded if the franchising authority does not meet one of the three certification requirements set forth in the Communications Act such as a failure to adopt and administer rate regulations in a manner that is consistent with the Commission's rules, a lack of legal authority or personnel to administer rate regulations, or the failure to adopt procedural rules which allow for the participation of interested parties.[14] Our regulations specify the appropriate grounds for a petition for reconsideration of the certification of a local franchising authority. There are two such grounds: (i) that the cable operator is not subject to rate regulation because effective competition exists, or (ii) the franchising authority does not meet the certification standards set forth in the 1992 Cable Act.[15] Cablevision's petition goes to the latter of these grounds and argues that the Town's revocation of its franchise "demonstrate[s] conclusively that it cannot be entrusted with the responsibility for regulating basic cable service in a manner consistent with the Commission's regulations."[16]

8. The Communications Act provides a remedy for cable operators whose requests for franchise modification are denied. Pursuant to Section 635, a cable operator may appeal a franchise modification denial to a district court of the United States for any judicial district in which the cable operator's system is located, or any state court of general jurisdiction that has jurisdiction over the parties.[17] As discussed above, Cablevision has exercised its right to bring such an action in the United States District Court for the Eastern District of New York. Indeed, the district court has already issued a ruling in Cablevision's favor that is currently on appeal to the Second Circuit.

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granted will be maintained after such modification." *Id.*

[9] *Cablevision Systems Corp. v. Town of East Hampton*, 862 F. Supp. 875 (E.D. N.Y. 1994).

[10] *See* Communications Act §§625(b)(1), 635(a), 47 U.S.C. §§545(b)(1), 555(a). Section 625 provides that "[a]ny cable operator whose request for modification under subsection (a) has been denied by a final decision of a franchising authority may obtain modification of such franchise requirements pursuant to the provisions of section 635." *Id.* §625(b)(1). Section 635 of the Communications Act provides that cable operators who are aggrieved by a denial of a franchise modification request may, within 120 days, appeal such decision to either a federal district court for any judicial district in which the cable system is located, or a state court of general jurisdiction having jurisdiction over the parties. *Id.* §635(a).

[11] *Cablevision Systems Corp. v. Town of East Hampton*, 862 F. Supp. 875 (E.D. N.Y. 1994).

[12] *Cablevision Systems Corp. v. Town of East Hampton*, Docket No. 94-9010 (2nd Cir. decision pending).

[13] *See* 47 C.F.R. § 76.910(b)(1).

[14] *See supra* n.5.

[15] 47 C.F.R. §76.911(a).

[16] Cablevision Petition at 11.

[17] *See supra* n.10.

9. The pending court proceeding and the certification challenge before us clearly involve the same alleged grievance. There is an extensive overlap between the two proceedings, the core of each complaint is associated with the revocation of Cablevision's franchise. We also note that East Hampton has been enjoined by a federal district court from proceeding with the revocation of Cablevision's franchise. Given this extensive overlap and the district court's decision, we believe, as a matter of deference to the court and in the interests of economy of administrative resources, that it is appropriate that we exercise our discretion and withhold action on Cablevision's decertification request at this time, without prejudice to its being refiled, should circumstances warrant, subsequent to the resolution of the judicial proceeding. In the interim, specific issues, if any, relating to rate setting by East Hampton may be brought to the Commission's attention through the rate appeal process set forth in our rules.[18]

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Cablevision Systems Corporation and Cablevision Systems East Hampton Corporation challenging the certification of the Town of East Hampton, New York to regulate Cablevision's basic service cable rates IS DISMISSED WITHOUT PREJUDICE.

11. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules.[19]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[18] *See* 47 C.F.R. §76.944.
[19] 47 C.F.R. § 0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-111

In the Matter of

Amendment of Section 73.202(b),	RM-8652
Table of Allotments,	
FM Broadcast Stations.	
(Athens, Illinois)	

NOTICE OF PROPOSED RULE MAKING

Adopted: July 5, 1995; **Released: July 26, 1995**

By the Chief, Allocations Branch:

Comment Date: September 18, 1995
Reply Comment Date: October 3, 1995

1. The Commission has before it a petition for rule making filed by WMS1, Inc. ("petitioner"), proposing the allotment of Channel 241A to Athens, Illinois, as that community's first local transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 241A to Athens, Illinois, since it could provide that community with its first local transmission service. An engineering analysis has determined that Channel 241A can be allotted to Athens in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.4 kilometers (4.6 miles) southwest,[1] in order to avoid a short spacing to the licensed site of Station WHOW(FM), Channel 240A, Clinton, Illinois, and Station KMXG(FM), Channel 241C1, Clinton, Iowa.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Athens, Illinois	--	241A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 18, 1995,** and reply comments on or before **October 3 , 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Larry Williams
WMS1, Inc.
2901 S. Holmes
Springfield, IL 62704
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 241A at Athens, Illinois, are North Latitude 39-53-57 and West Longitude 89-46-04.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-113

In the Matter of

Amendment of Section 73.202(b) RM-8664
Table of Allotments,
FM Broadcast Stations.
(Salem, West Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 7, 1995; Released: July 26, 1995

Comment Date: September 18, 1995
Reply Comment Date: October 3, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Salem-Teikyo University ("petitioner"), proposing the allotment of Channel 258A at Salem, West Virginia, as the community's second local FM transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration since it could provide Salem with an additional local FM transmission service. An engineering analysis has determined that Channel 258A can be allotted to Salem in compliance with the Commission's minimum distance separation requirements at city reference coordinates.[1] Since Salem is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Salem, West Virginia	289A	258A, 289A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filingH& requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 18, 1995,** and reply comments on or before **October 3, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 258A at Salem are North Latitude 39-17-00 and West Longitude 80-34-00.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-114

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Raton, New Mexico)	RM-8666

NOTICE OF PROPOSED RULE MAKING

Adopted: July 10, 1995; Released: July 26, 1995

Comment Date: September 18, 1995
Reply Comment Date: October 3, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by N Joy Broadcasting ("petitioner") requesting the allotment of Channel 243A to Raton, New Mexico, as the community's second local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 243A to Raton since an interest has been expressed in providing the community with its second local and first competitive FM service. Channel 243A can be allotted to Raton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Raton, New Mexico	229C2	229C2, 243A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 18, 1995,** and reply comments on or before **October 3, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mary Alice Rateau	Larry G. Fuss
8264 South Cody	P.O. Box 1787
Littleton, CO 80123	Cleveland, MS 38732
(Petitioner)	(Consultant to Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 243A at Raton are 36-54-00 North Latitude and 104-24-00 West Longitude.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-112

In the Matter of

Amendment of Section 73.202(b), RM-8663
Table of Allotments,
FM Broadcast Stations.
(Lordsburg, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 10, 1995; Released: July 26, 1995

Comment Date: September 18, 1995
Reply Comment Date: October 3, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Hildalgo County Broadcasters ("petitioner") requesting the allotment of Channel 279C3 to Lordsburg, New Mexico, as its second local FM service.[1] Petitioner states that it will apply for the channel, if allotted.

TECHNICAL SUMMARY

2. Channel 279C3 can be allotted to Lordsburg in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Mexican concurrence in this allotment is required because Lordsburg is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

3. We believe the public interest would be served by proposing the allotment of Channel 279C3 at Lordsburg since it could provide the community with its second local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lordsburg, New Mexico	250C	279C3, 250C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 18, 1995,** and reply comments on or before **October 3, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1225 Connecticut Avenue, N.W., #300
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] We note that petitioner requested the allotment of Channel 223C3 to Lordsburg. However, on our own motion, we have substituted for consideration Channel 279C3 to avoid a conflict with the possible allotment of Channel 223C3 at Wilcox, Arizona. Channel 223C3 has been proposed as an additional equivalent channel to facilitate the non-adjacent channel upgrade for Wilcox Station KWCX-FM from Channel 252A to Channel 285C3. *See* MM Docket 95-50, 10 FCC Rcd 4894 (1995).

[2] The coordinates for Channel 279C3 at Lordsburg are 32-20-48 North Latitude and 108-42-36 West Longitude.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-120

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Premont, Texas)	RM-8650

NOTICE OF PROPOSED RULE MAKING

Adopted: July 14, 1995; Released: July 26, 1995

Comment Date: September 18, 1995
Reply Comment Date: October 3, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Paulino Bernal ("petitioner"), licensee of Station KMFM(FM), Premont, Texas, seeking the substitution of Channel 264C3 for Channel 285A at Premont, Texas. Petitioner states that he will apply for Channel 264C3, if allotted.

2. In support of his proposal, petitioner states Station KMFM(FM) is the only station licensed to Premont and is limited to 3 kW effective radiated power. He states grant of his proposal would permit service to 77,446 persons as presently compared with 11,552 persons. He contends that the proposed change represents a more efficient use of the FM broadcast band in south Texas and eliminates a substandard allotment.

3. We believe petitioner's proposal warrants consideration since it could provide Premont with a wide coverage area FM service. Channel 264C3 can be allotted to Premont in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.7 kilometers (4.8 miles) east in order to avoid a short spacing conflict with the licensed site of Station KBDR(FM), Channel 263C2, Mirando City, Texas.[1] Since Premont is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government will be requested. In addition, the proposal must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Kingsville, Texas. As requested, we shall also propose to modify petitioner's license. However, in the event that competing expressions of interest are received, we may not modify petitioner's authorization since our engineering analysis has confirmed petitioner's claim that there are no additional Class C3 channels available for use by any other interested parties.[2]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Premont, Texas	285A	264C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 18, 1995,** and reply comments on or before **October 3, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Barry D. Wood
Jones, Waldo, Holbrook & McDonough
2300 M Street, N.W.
Washington, D.C. 20037
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Com-

[1] The coordinates for Channel 264C3 at Premont are North Latitude 27-21-35 and West Longitude 98-02-45. Petitioner suggested that the allotment could be made at coordinates North Latitude 27-28-27 and West Longitude 98-03-10 with a site restriction of 14.4 kilometers (9.0 miles) northeast. Consistent with Commission policy, we will advance the less restrictive site for the allotment of Channel 264C3 at Premont.

[2] Section 1.420 of the Commission's Rules permits the modification of a station's license to specify a non-adjacent higher class channel, without placing a station's existing authorization at risk, when an additional equivalent channel is available in the community involved for use by other interested parties.

mission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-200

In the Matter of

Amendment of Section 73.202(b), RM-8018
Table of Allotments,
FM Broadcast Stations
(Bronson and Cross City, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 18, 1995; Released: July 26, 1995

By the Chief, Allocations Branch:

1. Pursuant to the request of Women in Florida Broadcasting, Inc. ("Women"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 5941 (1992), proposing the reallotment of Channel 295C1 from Cross City, Florida.[1] to Bronson, Florida, and the modification of Station WDFL(FM)'s license to specify Bronson, Florida, as its community of license. Comments were filed by Women, and Greg Strickland ("Strickland"). Sarasota-FM, Inc. ("SFI"), licensee of Station WSRZ(FM), Sarasota, Florida, and Gator Broadcasting Corporation ("Gator"), licensee of Station WRRX(FM), Micanopy, Florida, filed joint comments. Women filed reply comments.[2]

2. Women filed comments restating its intention to apply for Channel 295C1 at Bronson, Florida, if allotted. Women also states that Bronson is one of six county seats in Florida without a local broadcast station.

3. Strickland in his comments argues that Women intend to serve the nearby urbanized area of Gainesville (population 84,770) which is 20 miles north east of Bronson. Strickland states that if the Commission reallots Channel 295C1 to Bronson, it would be possible to operate a station on Channel 295C2 approximately 15 miles north of Bronson, which would provide a 70dbu signal over the city of Gainesville. Strickland contends that if the reallotment is made Women will request a downgrade to Class C2 status and direct its signal, programming and sales effort to Gainesville not Bronson. Strickland also states that the proposed reference coordinates will provide a 70dbu signal over both Cross City and Bronson. Strickland argues that should the Commission reallot Channel 295C1 to Bronson, it should require minimum Class C1 operations at the proposed reference site, since this will preserve service to Cross City and also allow service to Bronson.

4. SFI/Gator in their comments state that they have no objections to the reallotment of Channel 295C1 from Cross City to Bronson, Florida, however, they request that the Commission take official notice of their *Petition for Rule Making* and comments in the *Beverly Hills, Florida*, proceeding, *See* MM Docket No. 92-195, *Report and Order*, 8 FCC Rcd 2197 (1993), and *Memorandum Opinion and Order*, 8 FCC Rcd 8515 (1993). SFI\Gator state that the reallotment of Channel 295C1 from Cross City to Bronson should not be mutually exclusive with their pending proposals.

5. In reply comments Women states there is no conflict between its proposal and any of SFI/Gator's proposals. Women notes that its proposal entails no change in the reference site presently specified for Channel 295C1 at Cross City. Women argue that Strickland's comments are based on inconclusive evidence, and a misunderstanding of the change of community of license process, citing *Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"*, 4 FCC Rcd 4870 (1989), *recon. granted in part (Change of Community MO&O")*, 5 FCC Rcd 7094 (1990). Women states that neither Cross City nor Bronson is part of any census-defined Urbanized Area. Even though Gainesville is the closest city to Bronson, it is neither so close nor so interrelated as to swallow Bronson's civic identity within its own. Bronson is the county seat of Levy County and Gainesville is the county seats of Alachua County. In addition, Women notes that its present proposal provides primary service not only to Cross City, Bronson and Gainesville, but to numerous other communities in the area as well. Women also state that Strickland's request to restrict its flexibility is entirely inappropriate at the allotment stage. Women argue that Strickland's comments seek to apply criteria the Commission has expressly rejected, not to mention being based entirely on speculation, since it has not been verified.

6. Based on the information before us, we find that the public interest would not be served by reallotting Channel 295C1 from Cross City to Bronson, Florida. In examining a change of community of license proposal, we must determine whether the proposal would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures, *supra*. In determining whether a proposed reallotment represents a preferential arrangement of allotments, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities.[3] Here, we have examined the two communities with respect to their relative locations, populations and reception services and find that Bronson is significantly smaller in population, is

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[1] In MM Docket No. 87-455, the Commission substituted Channel 295C1 for Channel 292A at Cross City, Florida. *See Report and Order*, 4 FCC Rcd 5599 (1989), *recon. denied*, 7 FCC Rcd 2557 (1992), *app. for rev. granted*, 10 FCC Rcd 138 (1995).

[2] After the record closed Women filed a request for expedited consideration. Dickerson Broadcasting, Inc. ("Dickerson") licensee of Station WEAG(FM) and WEAG(AM), Starke, Florida, filed a petition to dismiss and return Women's petition. Women filed a request for additional time to submits its opposition to Dickerson's petition to dismiss. Women filed a "Motion to Strike or Alternatively Opposition to Petition to Dismiss and Return its Petition." Commission Rule 1.415(d) precludes the filing of untimely comments unless specifically requested or authorized by the Commission. Therefore, we will not consider these pleadings in connection with this proceeding.

[3] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1992). The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters [Co-equal weight given to priorities (2) and (3)].

located closer to the Gainesville Urbanized Area and therefore receives far more reception services than Cross City. In addition, Bronson will continue to receive service from Station WDFL(FM), since it is not proposing to change its transmitter site and currently provides Bronson with a city-grade signal. Women has also provided no evidence suggesting that it is unable to provide Bronson with any specialized service at this time. Furthermore, in making this comparison, we note that this proposal would provide Bronson (population 875) with a ninth FM reception service (Bronson currently receives eight FM and five AM reception services) which falls under priority four, other public interest matters. While Cross City (population 2,041), the larger community, would continue to receive reception service from four FM stations and five AM stations, and retain its sole local FM service, thus falling under priority three, which is a higher allotment priority. Even though, the population of Bronson may be increasing more rapidly than that of Cross City, we do not believe that this factor justifies the removal of the sole local FM station at Cross City. *See Change of Community R&O and MO&O, supra.*, and *Brunswick and Waycross, Georgia,* 8 FCC Rcd 17 (1993). We find that the reallotment of Channel 295C1 from Cross City, Florida, to Bronson, Florida, does not provide a public interest benefit significant enough to override the loss of Cross City's sole local FM transmission service.

7. Accordingly, IT IS ORDERED, That the petition for rule making filed by Women in Florida Broadcasting, Inc. to reallot Channel 295C1 from Cross City, Florida to Bronson, Florida, IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Olympic Broadcasters, Inc.
(Assignor)
and BAPLH-940815GE
Sierra Radio Company
(Assignee)

For Assignment of Construction
Permit and License of KRNV(FM)
Reno, Nevada

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1995; Released: July 26, 1995

By the Commission:

1. The Commission has before it the above-captioned, unopposed, application for assignment of license of KRNV(FM), Reno, Nevada from Olympic Broadcasters, Inc. ("Olympic") to Sierra Radio Company ("Sierra") and a related request for waiver of 47 C.F.R. § 73.3555(b), the Commission's one-to-a-market rule.[1] Sierra is currently the licensee of VHF station KRNV-TV (NBC), licensed to Reno, Nevada, and has provided programming and commercial sales to KRNV(FM) since May 1, 1994. By the instant application, Sierra seeks to acquire its first FM station in the Reno market. Because KRNV-TV's Grade A contour encompasses KRNV(FM)'s entire community of license, grant of the subject assignment application would create a new radio-television combination that requires waiver of the one-to-a-market rule. As set forth below, we will grant the waiver request and the assignment application.

2. *Waiver Request.* Sierra bases its waiver request on the one-to-a-market standards adopted in the *Second Report and Order* in "MM Docket 87-7, 4 FCC Rcd 1741 (1989) (*"Second Report and Order"*), *recon. denied in part and granted in part* (*"Second Report and Order Recon."*), 4 FCC Rcd 6489 (1989). Under these standards, the Commission will presume that waiver of the rule will serve the public interest in cases involving (1) stations serving the top 25 markets where at least 30 separately owned, operated, and controlled stations will remain following the proposed combination; or (2) "failed" stations (stations that have not been operational for a substantial period of time or are involved in bankruptcy proceedings). Otherwise, the waiver request must be evaluated under the more rigorous case-by-case standard. Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) the public service benefits that will arise from the joint operation of the facilities, such as economies of scale, cost savings and programming and service benefits; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after joint operation is implemented. *Second Report and Order,* 4 FCC Rcd at 1753. In weighing these factors, we do not require that all five of the criteria be satisfied as a precondition to grant of a waiver of the rule. *Second Report and Order Recon.*, 4 FCC Rcd at 6491 Since the Reno market is not in the top 25 markets and the station involved is not a "failed" station, Sierra submits a showing addressing the case-by-case factors.

3. *Benefits of Joint Operation.* Sierra contends that significant cost savings, economies of scale, and technical, operational and programming service benefits will be realized if the Commission allows the proposed combination. Sierra proposes co-locating the studios for KRNV(FM) and KRNV-TV, with the stations sharing broadcast and production equipment as well as administrative and technical staff of Sierra's parent corporation, Sunbelt Broadcast Company.[2] The assignee estimates that combining such operations will save approximately $16,000 monthly ($192,000 annually) and result in numerous programming benefits to its listening public. Sierra indicates that the stations will share news-gathering operations, with the television station making its information gathering, audio broadcasting and simulcasting resources available to KRNV(FM), which will provide the only all-news programming service to Reno. Finally, Sierra states that combined operations will result in increased public service programming and non-broadcast public service efforts for KRNV(FM). In support, Sierra lists the numerous community projects and public interest campaigns it has been involved within the last 2 years and indicates its intent to expand such efforts through KRNV(FM).[3]

4. *Other Media Outlets/Type of Facilities.* Other than KRNV-TV, Sierra indicates it will own only KRNV(FM) in the Reno market. KRNV(FM) is a Class C3 FM station operating at 11 kW effective radiated power (ERP) from an antenna 150 meters height above average terrain (HAAT).

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[1] Section 73.3555(b) of the Commission's rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station. *See* 47 C.F.R. § 73.3555(b).

[2] Sierra is entirely owned by Sunbelt Broadcasting Company, which also owns all of the issued and outstanding stock of Yuma Broadcasting Company, licensee of KYMA-TV in Yuma, Arizona.

[3] According to Sierra, KRNV-TV has produced public service announcements for the Air Force, Salvation Army, Crime Prevention Council, DARE Program, National Safety Council, Points of Light, Intercultural Student Exchange, United Negro College Fund, National Institute on Aging, Child Abuse and Domestic Abuse Task Forces, and the Employer Support Guard. Sierra's "Community Billboard" listings for events in the Reno area are aired forty-four times a week on KRNV-TV and eighty-four times a week on KRNV(FM). Sierra states it presently runs the KRNV(FM) public service listings pursuant to the programming and sales agreement.

KRNV-TV is an NBC-affiliated VHF television station operating on Channel 4 at 17.4 kW ERP and an antenna height of 128 meters HAAT. Sierra, in support of its contention that the subject facilities do not dominate the market, asserts that KRNV-TV and KRNV(FM) operate with facilities that are substantially comparable to all other television stations and FM stations in the Reno market.

5. *Economic Status.* Olympic reports that it lost over $557,000 in the three and one-half-year period it has operated KRNV(FM), commencing with a $268,000 loss in the first thirteen months (December, 1990 - January 1, 1992) of its operation. Sierra further contends that in 1992 losses were reduced to $36,775, but that its 1993 losses exceeded $240,000 and that its 1994 losses, even with the benefits of the programming and sales agreement, totaled over $208,000. Sierra also claims that KRNV(FM)'s poor "financial health" scuttled the sale of the station to a party seeking to acquire both the FM facility and Olympic's financially successful AM station, KOH. Since Olympic has now sold KOH, Sierra maintains that Olympic must sell the FM station or discontinue its operations.

6. *Competition and Diversity in the Market.* The final factor addresses the nature of the relevant market in light of the Commission's concerns about diversity and competition. To determine the number of broadcast outlets in the market, the Commission considers the number of separately owned and operated broadcast "voices" and the degree of cable and other non-broadcast media penetration. As to the number of broadcast stations, we consider "the relevant ADI (Arbitron Area of Dominant Influence) for TV stations and the relevant TV metro market for radio stations." *Second Report and Order*, 4 FCC Rcd at 1760, n.101. Sierra contends that the Reno ADI, which includes 195,100 TV households, is ranked 118th in the country and contains 6 full-power television stations, licensed to 6 separate owners. Sierra also states that there are 17 FM and 7 AM operating radio stations in the Reno TV metro market, licensed to 15 separate owners. In addition, Sierra submits that the Reno ADI has 4 daily newspapers and 25 variably-scheduled newspapers and local magazines. The assignee also notes that 6 cable operators service the area and that approximately 68% of households in the market have cable access. Sierra therefore concludes that waiver of the one-to-a-market rule will not, given the abundant electronic and print media in the market, have any discernable effect on the media diversity or competition in the Reno market.

7. *Discussion.* "Our goal in all situations is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *Second Report and Order Recon.*, 4 FCC Rcd at 6491. We conclude that Sierra's showing in support of waiver of the one-to-a-market rule meets our case-by-case criteria, that a waiver in this instance is in the public interest, and that grant of the instant assignment application would not have an appreciable adverse effect on diversity and competition in the Reno market.

8. Sierra demonstrates that the common ownership of KRNV-TV and KRNV(FM) will create efficiencies resulting in significant cost savings and potential for enhanced programming and service benefits. The Commission has held that significant cost savings and economic efficiencies are "precisely the type of public interest benefit from common station ownership which we envision as warranting a waiver of the one-to-a-market rule. . .." *Great American Television* 4 FCC Rcd at 6349. Sierra has shown that joint operation of the stations will result in cost savings of at least $192,000 annually. Sierra also clearly demonstrates the potential for enhanced programming and other public service benefits for KRNV(FM) if the assignment is approved. Sierra indicates that the proposed FM-TV combination will significantly strengthen KRNV(FM)'s news and weather reporting ability, allowing KRNV(FM) to provide the only all-news radio service to Reno. It will also enable the FM station to avail itself of Sierra's resources and considerable experience in public service programming and public interest campaigns.

9. Sierra's waiver request establishes that KRNV(FM) has been experiencing serious financial difficulties. Overall, Olympic reports losing more than $557,000 in its three and one-half years of operating KRNV(FM). Although Olympic reduced its 1992 losses to $36,775, 1993 losses totaled $240,000 and 1994 losses exceeded $208,000. As noted in paragraph 5, *infra*, these losses scuttled a desired sale of KRNV(FM) to a party seeking to acquire both the FM station and Olympic's financially successful AM station, KOH. As Olympic has now sold KOH, Sierra maintains that the instant assignment may be the only alternative to the station going "dark." Financial difficulties of a similar nature have supported waiver under the case-by-case standard in prior cases. *See Tulsa 23*, 5 FCC Rcd 727, 728 (1990) (waiver warranted where seven consecutive years of financial losses compelled either sale or cessation of operations).

10. Sierra also demonstrates, and our records confirm, that the proposed FM-TV combination will not create any undue concentration of ownership or control of the broadcast media in the Reno market. Aside from the subject stations, Sierra owns no other media outlets in the market and the subject stations have facilities comparable to other stations in the market. The Reno market is served by 6 television stations and 24 radio stations. After the assignment is approved, the 6 television stations will be separately owned and the 24 operating radio stations will be owned by 15 separate owners. The record thus indicates that there will be 20 separately-owned and operated broadcast stations after consummation of the proposed transaction. As Sierra has pointed out, other "voices" in the market are plentiful, including, *inter alia*, 4 daily newspapers and 6 cable operators with a penetration rate of 68%. In view of the number of broadcast voices remaining in the Reno market and the number and nature of Sierra's proposed combination of facilities, Sierra has demonstrated that there will not be any significant reduction in diversity and competition resulting from grant of the subject application and that significant public interest benefits will result.

11. Accordingly, IT IS ORDERED, That the request for waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(b), IS HEREBY GRANTED; and having found the applicants fully qualified, the application for assignment of license of KRNV(FM) from Olympic Broadcasters, Inc. to Sierra Radio Company IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-122

In the Matter of

Amendment of Section 73.202(b), RM-8668
Table of Allotments,
FM Broadcast Stations.
(Lexington, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 18, 1995; Released: July 26, 1995

Comment Date: September 18, 1995
Reply Comment Date: October 3, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Floriplex, Inc. ("petitioner"), requesting the allotment of Channel 243A to Lexington, Tennessee, as the community's second local commercial FM service. Petitioner states it will apply for Channel 243A, if allotted.

2. We believe petitioner's proposal warrants consideration since it could provide Lexington with its second commercial FM service. Channel 243A can be allotted to Lexington in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.1 kilometers (5.6 miles) northeast in order to avoid a short-spacing conflict with the licensed site of Station WMOD(FM), Channel 244A, Bolivar, Tennessee.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lexington, Tennessee	257A	243A, 257A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 18, 1995,** and reply comments on or before **October 3, 1995,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis P. Corbett
Leventhal, Senter & Lerman
2000 K St., N.W.
Suite 600
Washington, D.C. 10006-1809
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 243A at Lexington are North Latitude 35-43-33 and West Longitude 88-21-13. Petitioner proposed coordinates North Latitude 35-43-51 and West Longitude 88-21-35 with a site restriction of 9.4 kilometers (5.8 miles) northeast. However, the Commission generally does not protect a prospective applicant's desired transmitter site for a new allotment if a less restrictive site is available, as there is no guarantee that the petitioner will ultimately become the licensee. Therefore, we will not consider petitioner's site, and advance a less restrictive site for the allotment of Channel 243A at Lexington, Tennessee.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SAMMONS OF FORT WORTH

Appeal of Local Rate Order
of City of Ft. Worth, Texas

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 1995; Released: July 26, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 12, 1995, Sammons of Ft. Worth ("Sammons"), the franchisee in the above-matter, filed an appeal of a local rate order adopted by its franchising authority, the City of Ft. Worth, Texas (the "City"), on December 13, 1994.[1] The City's local rate order requires Sammons to establish a new rate schedule for its basic service tier and associated equipment and installations and to issue refunds to subscribers for charges in excess of the newly established rates for the time period beginning September 1, 1993 and ending July 15, 1994.[2]

2. Sammons raises several issues in its appeal: (1) that the City unlawfully ordered subscriber refunds even though its authorityto order refunds had expired; (2) that the City improperly imposed refund liability dating back to September 1993 and failed to follow the mathematical formula required by the Commission for calculating refunds; (3) that the City improperly reduced Sammons' equipment and installation without increasing Sammons' basic tier programming rate; (4) and that the City made several math errors, such as an incorrect tax multiplier and overtime pay figure, and substituted its own numbers and data, such as installation labor hours and monthly equipment revenue (Line 104, Worksheet 1 of Form 393), for Sammons' figures without adequate justification.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

4. When a cable operator files either a benchmark or cost-of-service rate justification, the Commission's rules provide a franchising authority 30 days in which to review the rate filing before the proposed rates become effective.[7] In cases involving benchmark filings (i.e., filings based on FCC Form 393), a franchising authority may toll this deadline for an additional 90 days if it needs more time to review the filing, giving thefranchising authority a total of 120 days to issue an order before the proposed rates go into effect.[8] At the end of the 120-day period (the original 30 days plus the additional 90 days), the proposed rates will go into effect if the franchising authority has not issued a rate decision.[9] The franchising authority, however, may still preserve its authority to order subscriber refunds based on the new rates by issuing an accounting order, directing the cable operator to keep an accurate account of its financial records.[10] If a franchising authority has not rendered a decision within the available 120-day review period and has not issued an accounting order before that period has expired, the franchising authority may not later order subscriber refunds under our rules.[11] Our rules provide that the issuance of an accounting order is necessary only to

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[1] Also on January 12, 1995, Sammons filed a Request for Emergency Stay pending Commission review of its appeal. The City did not file an opposition to either the stay petition or appeal. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b) (1992).

[3] *See* 47 C.F.R. § 76.944 (1993).

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] *See* 47 C.F.R. § 76.933(a) (1993).

[8] *See* 47 C.F.R. § 76.933(b) (1993). In the case of a cost-of-service filing, the local franchising authority may extend the review period by 150 days. *Id.* This would give the local franchising authority a total of 180 days (the original 30 days plus the additional 150 days) to review the cost-of-service filing before the proposed rates would go into effect.

[9] *Id.*

[10] *See* 47 C.F.R. § 76.933(c) (1993).

[11] If a franchising authority has availed itself of the additional 90 or 150 [for cost-of-service proceedings] days permitted in paragraph (b) of this section, and has taken no action within these additional time periods, then the proposed rates will go into effect at the end of the 90 or 150 day period, or existing rates will remain in effect at such times, subject to refunds if the franchising authority subsequently issues a written decision disapproving any portion of such rates, *provided, however*, that in order to order refunds, a franchising authority must have issued a brief written order to the cable operator by the end of

preserve refund authority. A franchising authority that does not issue an accounting order before its allowable period of review expires may still prescribe rates and order a prospective rate reduction.

5. Because the City did not issue an accounting order before the conclusion of its review period, it lost the authority to order subscriber refunds. As a result of the City's failure to issue an accounting order, the other issues raised by Sammons, all refund-related, are rendered moot. We note, however, that, although Sammons is not liable for the refunds ordered by the City with regard to the rates set under Form 393, in effect from September 1, 1993 until July 15, 1994,[12] this order has no effect upon the City's authority to set rates and order subscriber refunds subsequent to July 15, 1994.

III. Ordering Clauses

6. Accordingly, IT IS ORDERED that Sammons' appeal of the local rate order adopted by the City of Ft. Worth, Texas IS GRANTED. IT IS FURTHER ORDERED that Sammons' appeal IS REMANDED to the local franchising authority for further proceedings consistent with this opinion.

7. IT IS FURTHER ORDERED that Sammons's stay request IS DISMISSED.

8. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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the 90 or 150-day period permitted in paragraph (b) of this section directing the operator to keep an accurate account of all amounts received by reason of the rate in issue and on whose behalf such amounts were paid." 47 C.F.R. § 76.933(c) (emphasis in the original); Chillicothe Cablevision, Inc. (Washington Court House, Ohio), DA 95-479 (Cab. Ser. Bur., released March 14, 1995).

[12] The period at issue here is from September 1, 1993 to July 15, 1994 because Sammons took advantage of the refund deferral period set out in Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4184-86 (1994) (*"Second Recon. Order"*). Otherwise, the refund liability period under the Form 393 is from September 1, 1993 through May 15, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-244

In the Matter of

Amendment of Section 73.202(b),	RM-8027
Table of Allotments,	RM-8182
FM Broadcast Stations.	RM-8183
(Charlotte Amalie, Cruz Bay, Frederiksted and Christiansted Virgin Islands and Aguada, Gurabo, Utuado, San Juan, Ponce and Carolina, Puerto Rico)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 14, 1995; Released: July 26, 1995

By the Chief, Allocations Branch:

1. At the request of Robert E. Miller, Jonathan Cohen and Arthur V. Belendiuk, d/b/a Calypso Communications ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7236 (1992), proposing the substitution of Channel 267B for Channel 246B at Charlotte Amalie, Virgin Islands, and the modification of Station WVNX(FM)'s construction permit accordingly (RM-8027). Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. Paradise Broadcasting Corporation ("Paradise"), permittee of Station WDCM(FM), filed comments and a counterproposal proposing the substitution of Channel 267B for Channel 222B at Cruz Bay, Virgin Islands, and the modification of Station WDCM(FM)'s construction permit accordingly (RM-8182).[2] Comments and a counterproposal were also jointly filed by El Mundo Broadcasting Corporation, licensee of Station WKAQ-FM, San Juan, Puerto Rico; Estereotempo, Inc., licensee of Station WIOC-FM, Ponce, Puerto Rico; Radio Redentor, Inc., licensee of Station WERR-FM, Utuado, Puerto Rico; and Aurio Matos, licensee of Station WNNV-FM, Aguada, Puerto Rico ("counterproponents"), proposing the substitution of Channel 287B1 for Channel 288A at Aguada, Puerto Rico, and the modification of Station WNNV(FM)'s construction permit accordingly. Additionally, counterproponents request the reallotment of Channel 281B from Utuado to Gurabo, Puerto Rico, and the modification of Station WERR-FM's license to reflect the change of community of license. In order to accommodate their proposal, counterproponents propose the substitution of Channel 285B for Channel 284B at San Juan, Puerto Rico; the substitution of Channel 283B for Channel 286B at Ponce, Puerto Rico; the substitution of Channel 267B for Channel 246B and the substitution of Channel 298B for Channel 282B at Charlotte Amalie, Virgin Islands; the substitution of Channel 300B for Channel 299B at Carolina, Puerto Rico; the allotment of Channel 282A at Frederiksted, Virgin Islands; and the allotment of Channel 274A at Christiansted, Virgin Islands (RM-8183).[3] Comments were filed by Virgin Islands Stereo Communications Corporation ("VISC") and Asociacion Puertorriquena Del Este De Los Adventistas Del Septimo Dia ("Adventistas"). Adventistas also filed a supplement to its comments.[4] Reply comments were filed by petitioner, Paradise, counterproponents, VISC and Radio Redentor, Inc. VISC also filed further reply comments. Petitioner filed a motion for extension of time to file reply comments.[5] After the pleading cycle closed, counterproponents filed a motion for leave to file supplemental comments.[6]

2. *Pleadings*. In support of its proposal, petitioner states that Station WVNX(FM) was granted a construction permit (BPH-870707MI) for Channel 246B at Charlotte Amalie, Virgin Islands. However, petitioner claims it cannot construct and operate a Class B facility on the channel without causing objectionable electrical interference to Channel 247C, Tortola, British Virgin Islands. Petitioner asserts that the problem can be eliminated if Station WVNX(FM) op-

[1] The communities of Cruz Bay, Aguada, Gurabo, Utuado, San Juan, Ponce, and Carolina, Puerto Rico, have been added to the caption.

[2] We note that Station WDCM(FM)'s construction permit (File No. BPH-930106JI) was assigned from Paradise Broadcasting Corporation to Jersey Shore Broadcasting Corporation (File No. BAPH-G) on December 28, 1993 and consummated on January 14, 1994.

[3] Public Notice of the counterproposals was given on February 17, 1993, Report No. 1927.

The counterproponents filed identical comments and counterproposal in MM Docket Nos. 92-244, 92-245 and 92-247. After the pleading cycles closed, counterproponents filed a consolidated notice of withdrawal in all three dockets. An affidavit was filed by counterproponents stating that no consideration was received in exchange for their withdrawal pursuant to Section 1.420(j)(1) of the Commission's Rules. We will grant the withdrawal request. Accordingly, responsive pleadings to the counterproposal are moot and will not be discussed herein.

[4] Adventistas submitted a supplement of an executed affidavit by its consulting engineer of the technical exhibit (Appendix B) originally filed with its comments.

[5] An extension of time for petitioner to file reply comments was informally granted on January 19, 1993.

[6] Although the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods, counterproponents' supplemental comments were accompanied by a motion for leave to file. However, with the withdrawal of the counterproponents' petition, the supplemental comments which are in response to VISC's allegation that two affected parties were not served are now moot and will not be discussed herein.

After the pleading cycle closed, a letter was also filed by Richard L. Biby ("Biby") of Communications Engineering Services, refuting petitioner's representation that Biby had prepared petitioner's engineering statement. A motion to strike Biby's unauthorized was filed by petitioner. We find that the pleadings do not provide us with information of decisional significance. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, we will not accept the unauthorized pleadings.

erates on another frequency. Petitioner suggests that Channel 267B would be an acceptable substitution that satisfies the Commission's technical requirements.

3. In its counterproposal, Paradise requests the substitution of Channel 267B for Channel 222B at Cruz Bay, Virgin Islands, to eliminate harmful electrical interference with Channels 219C and 222B1 in Tortola, British Virgin Islands. In support of its proposal, Paradise states that the substitution of Channel 267B for Channel 222B at Cruz Bay would provide the community with its first local aural transmission service. Paradise acknowledges that both petitioner and Paradise seek substitutions of their respective channels to eliminate harmful international electrical interference. However, Paradise asserts that under FM priority three, a first local aural transmission service at Cruz Bay should be preferred over a ninth local transmission service at Charlotte Amalie, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 90-93 (1982).[7] Paradise claims that Charlotte Amalie already has eight (three AM and five FM) local transmission services. Paradise maintains that the Commission has long recognized the importance of providing a community with its first local aural transmission service, citing *Atchison et al, Kansas*, 7 FCC Rcd 4645 (1992); *Alegria I, Inc.*, 61 RR 2d 136 (1986); *Caldwell Broadcasting Corp.*, 100 FCC 2d 115 (1985); *Alessandro Broadcasting Corp.*, 99 FCC 2d 1 (1984). Further, Paradise claims that under priority four, Paradise's proposal should prevail over petitioner's proposal because the public interest would be better served by the substitution of Channel 267B for Channel 222B at Cruz Bay. Additionally, Paradise states that Cruz Bay is the principal city on the island of St. John. As such, maintains Paradise, it is the primary source of local information for the residents of the island. In addition, the island's Medical Center, post office, library, government administrative offices, telephone company and other utilities offices, as well as several churches, schools and shops are located in Cruz Bay. Paradise claims that Cruz Bay is St. John's primary sea port and the only one at which cargo and cruise ships dock. Furthermore, Paradise alleges that Cruz Bay is also the home of numerous civic and social organizations. Accordingly, Paradise concludes that the public interest benefits of a first local aural transmission service at Cruz Bay outweigh the need for a ninth local aural transmission service at Charlotte Amalie. Therefore, Paradise requests that the substitution of Channel 267B for Channel 222B at Cruz Bay be granted, and that petitioner's request for the substitution of the same channel at Charlotte Amalie be denied. Paradise states its intention to apply for Channel 267B at Cruz Bay, if allotted.

4. In its opposing comments, VISC alleges that the site proposed by petitioner for Channel 267B at Charlotte Amalie is "sheltered by mountains" and completely blocks the possibility of any line-of-sight transmission from the St. John antenna to Charlotte Amalie. VISC submits a terrain profile demonstrating the shadowing that would result and contends that the site does not provide city grade coverage, and is, therefore, not in compliance with Section 73.315 of the Commission's Rules. VISC argues that petitioner's contention that Channel 246B at Charlotte Amalie would cause harmful interference with Channel 247C in Tortola, British Virgin Islands, is not valid since petitioner had "full knowledge" of the Tortola problem.[8] Moreover, VISC asserts that an additional station would cause a financial hardship on existing stations and would best be deferred until such time as it is "economically feasible." Accordingly, VISC concludes that since petitioner knew of the possible electrical interference with the Tortola allotment at the time its application was filed, petitioner should not be allowed to use that problem to justify changing channels.[9] Also, since the substitution of Channel 267B at Charlotte Amalie would not provide 70 dBu coverage because of shadowing, VISC urges that petitioner's proposal be denied.[10]

5. In its reply comments, petitioner argues that VISC's opposition to the substitution of Channel 267B at Charlotte Amalie is without merit. Petitioner submits an engineering analysis showing that at reference coordinates 18-21-26 and 64-56-50, either Channel 267B or Channel 298B, in conformance with the various proposals advanced in this proceeding, can be allotted at Charlotte Amalie without terrain shadowing limitations.[11] In addition, petitioner asserts that coverage of a community is properly addressed at the application stage where certification must be made that the 3.16 mV/m contour of a station serves the community without any major terrain obstruction. Petitioner argues that its proposed substitution is in the best interest of the public, and that Paradise's proposal has no merit and is "faulty." Accordingly, petitioner urges that its proposal to substitute Channel 267B for Channel 246B at Charlotte Amalie be granted.

6. In response to Paradise's counterproposal, petitioner states that Paradise claims that Channel 267B is the only alternate Class B channel available at Cruz Bay, but offers no justification for use of a Class B channel. Petitioner suggests that Cruz Bay can be adequately served by a Class A channel. Petitioner states that Cruz Bay has a population of 1,928[12] and the island of St. John has a population 2,472. Petitioner also states that the island has a land area of 51 square kilometers. Petitioner submits an engineering

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[7] The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3)]

[8] VISC notes that petitioner was the only applicant filing for Channel 246B at Charlotte Amalie, and had it not been for this fact, it would not have been permitted to "amend out" of a tenderability defect relating to multiple ownership in its original application.

[9] We note that a party's acceptance of a conditioned construction permit does not preclude our action to resolve later conflicts that may arise.

[10] Our engineering analysis has determined that at the petitioner's proposed reference coordinates, 18-20-30 and 64-43-59, there would be no major obstructions to prevent 70 dBu signal coverage to Charlotte Amalie. Therefore, the proposed substitution would be in compliance with Section 73.315 of the Commission's Rules.

[11] We note that with the withdrawal of the counterproponents' proposal, the allotment of Channel 298B at Charlotte Amalie is no longer a viable alternative. However, our engineering analysis confirms petitioner's claim that Channel 267B can be allotted to Charlotte Amalie at proposed reference coordinates 18-21-26 and 64-56-50 without a major terrain obstruction.

[12] Population figures taken from the 1980 U.S. Census. However, the 1990 Census population figures for Cruz Bay and St. John are 2,466 and 3,504, respectively.

analysis showing that at least two Class A channels (275A and 296A), which meet the Commission's technical requirements, are available at Cruz Bay that would provide coverage not only to Cruz Bay but to the entire island of St. John. Consistent with other actions taken in this rule making proceeding, petitioner asserts that Paradise has excluded these alternatives.[13] Accordingly, petitioner urges that Paradise's proposal be viewed as disingenuous and rejected.

7. In its reply comments, Paradise reiterates its earlier arguments and states that it has no objection to the substitution of an alternate viable channel at Cruz Bay which would allow both proposals to be accommodated. Paradise notes that the Commission fully considered the merits of allotting a Class B channel at Cruz Bay before the allotment was made several years ago. Paradise contends that it is neither appropriate now to reconsider that decision nor incumbent upon petitioner to suggest that a Class A channel could be substituted for an allotted Class B channel. Paradise concludes that if the channel substitution is made on a comparative basis, Paradise's proposal should prevail.

8. In its reply comments, VISC supports Paradise's proposal to substitute Channel 267B for Channel 222B at Cruz Bay. However, VISC notes that because of potential electrical interference with British Virgin Islands' allotments, Paradise probably was not "significantly challenged" for the grant of Channel 222B at Crud Bay. Thus, claims VISC, if Channel 267B is allotted at Cruz Bay, the public should be allowed to apply for the new allotment. Accordingly, VISC urges the Commission to grant Paradise's proposal. In its further reply comments, VISC reiterates its objection to adding a new channel to the Virgin Islands because of economic reasons. However, if the Commission allots Channel 267B at Charlotte Amalie or Cruz Bay, VISC states its desire to apply for the substituted channel.[14] In sum, VISC urges the Commission to accept other expressions of interest for Channel 267B to assure that the best "steward" is selected for the channel.[15]

9. In response to Paradise's counterproposal, Adventistas, licensee of Station WZOL(FM), states its support for the substitution of Channel 267B at Cruz Bay. Adventistas claims that Station WZOL(FM), Channel 221A, Luquillo, Puerto Rico, is short-spaced to Station WDCM(FM)'s construction permit site for Channel 222B at Cruz Bay. In addition, Adventistas states that Station WZOL(FM) has lost the future use of its transmitter site, and thus has filed an application (File No. BPH-930208II) to relocate its transmitter site approximately 7 kilometers (4.4 miles) east-southeast of its present site.[16] Adventistas alleges that the substitution of Channel 267B for Channel 222B at Cruz Bay would allow Station WZOL(FM) to operate at full power, enabling the station to serve a population of 809,813 compared to a population of 307,833 in the service area proposed in the pending application. Therefore, Adventistas maintains that the additional population which would receive new service from Station WZOL(FM)'s expanded coverage is significant and is in conformance with the Commission's FM priorities, citing *Revision of FM Assignment Policies and Procedures, supra; Stamps and Camden, Arkansas*, 3 FCC Rcd 3644 (1988); *Chippewa Falls, Wisconsin and Red Wing, Minnesota*, 4 FCC Rcd 6323 (1989). Accordingly, Adventistas urges the Commission to grant Paradise's proposal to substitute Channel 267B for Channel 222B at Cruz Bay.

10. *Discussion.* This proceeding presents a number of unique factors for consideration. Each proposal involves a station which received its construction permit conditioned on the outcome of negotiations with the British Virgin Islands. Each station is now precluded from operating on its originally allotted channel due to subsequent allotments made in the British Virgin Islands. After careful consideration of the pleadings before us, we conclude that approval of the proposed channel substitutions at both Charlotte Amalie and Cruz Bay to eliminate the harmful electrical interference caused by these British Virgin Islands' allotments is warranted. In an effort to provide each community with a channel substitution, the staff conducted a channel search to see if alternate channels were available. However, neither the proponents nor the Commission's staff has been able to find an alternate Class B channel for either community. Our analysis indicates that Channel 267B is the only channel which meets the Commission's domestic technical requirements that can be allotted at each community. Therefore, we will comparatively consider the proposals. Our comparative analysis shows that neither proposed substitution would provide a first or second full-time aural service to either Charlotte Amalie or Cruz Bay. In fact, the entire primary service 60 dBu contour area of each station, at its proposed substituted channel, is already well-served by at least five full-time reception services. The proposed primary service contour area for Channel 267B would serve 107,652 people if allotted at Charlotte Amalie, and 168,175 people if allotted at Cruz Bay. Although we will not do a *de novo* analysis pursuant to the allotment priorities, we will use them as a

[13] We find that petitioner's claim that Paradise does not justify its use of a Class B channel is without merit. Here, Paradise seeks the substitution of another Class B channel for one that has previously been allotted to the community. Therefore, petitioners suggestion that there are at least two Class A channels available at Cruz Bay is not relevant because Paradise has not requested one.

[14] VISC asserts that its ownership of a station in the Virgin Islands should not preclude it from filing an expression of interest in Channel 267B. VISC claims that petitioner has not divested its interest in Station WJKC(FM) in Christiansted, even though the commitment was made over five years ago. VISC concludes that at least for the present, petitioner's principals should be viewed as having two stations in the Virgin Islands.

[15] We reject VISC's argument that Channel 267B, if allotted to either Cruz Bay or Charlotte Amalie, should be open to the public for either expressions of interest or competing applications. VISC and other interested parties had the opportunity during the window periods for these allotments to file their applications. Furthermore, the proponents' construction permits have already been granted and the sole purpose of the channel substitutions is to eliminate harmful international electrical interference. Accordingly, we find that affording the public an opportunity to apply for the substituted channels is unwarranted.

[16] In order to avoid exacerbating the interference problem with Station WDCM(FM), Station WZOL(FM) has proposed to operate at less than full Class A power and to use a directional antenna to provide contour protection pursuant to Section 73.215 of the Commission's Rules. The alteration of Station WZOL(FM)'s service contours to protect Station WDCM(FM) causes "shrinkage" in the service area which means the population served within the primary service contour is smaller than it would be if the antenna were omnidirectional at full Class A power.

guide in our comparison. *See Revision of FM Assignment Policies and Procedures, supra.* Neither petitioner nor Paradise has claimed that the proposed channel substitutions would provide either a first or second full-time aural service. However, the channel substitution at Cruz Bay would provide the community with its first local transmission service, which triggers priority three. On the other hand, the channel substitution at Charlotte Amalie would provide the community with its ninth local transmission service, which triggers priority four--other public interest matters. In examining the merits of these proposals, we find that channel substitution at Cruz Bay is preferred because it triggers a higher allotment priority since it would provide a first local transmission service. Charlotte Amalie, by comparison, already has three local AM and five FM transmission services. Therefore, we believe the public interest would be served by the substitution of Channel 267B for Channel 222B at Cruz Bay, since it would provide the community's with its first local competitive broadcast service. An engineering analysis has determined that Channel 267B can be allotted to Cruz Bay in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.0 kilometers (11.8 miles) west.[17] As proposed, we will also modify Station WDCM(FM)'s construction permit to specify operation on Channel 267B at Cruz Bay. Pursuant to petitioner's request, the procedures outlined in *Modification of FM & TV Licenses*, 8 FCC 2d 916 (1984), and Section 1.420(g) of the Commission's Rules, do not apply in this case since no upgrade in facilities is contemplated. We believe Channel 267B is equivalent to Channel 222B for allotment purposes. Therefore, we consider channels of the same class to be equivalent unless showings have been made that a station cannot be constructed for reasons such as environmental consequences or air hazards. *See Vero Beach, Florida*, 3 FCC Rcd 1049 (1988), *rev. denied*, 4 FCC Rcd 2184, 2185 (1989).

11. In addressing VISC's arguments regarding the "economic infeasibility" of new allotments in the Virgin Islands, we note that the proponents do not request new allotments per se, rather they seek channel substitutions to enable the stations to operate on their allotted Class B channels without electrical interference. Furthermore, VISC's concerns that additional allotments in the Virgin Islands would increase competition raise issues which the Commission has already determined not relevant in either a licensing or allotment context. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989). Consequently, there is no basis under the current state of Commission precedent for consideration of those issues. In a related context, there is no Commission requirement for Paradise Broadcasting Corporation or any other party to demonstrate a "demand" or need for an allotment aside from the already stated willingness of Paradise to apply for Channel 267B at Cruz Bay and construct the proposed facilities.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 11, 1995,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Cruz Bay, Virgin Islands	267B

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Jersey Shore Broadcasting Corporation for Station WDCM(FM), Cruz Bay, Virgin Islands, IS MODIFIED to specify operation on Channel 267B in lieu of Channel 222B, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WDCM(FM)'s construction permit BPH-930106JI, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-930106JI, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

14. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee, as follows:

Jersey Shore Broadcasting Corporation

P.O. Box 1000

Manahawkin, New Jersey 08050

15. IT IS FURTHER ORDERED, That the proposal filed by Robert E. Miller, Jonathan Cohen and Arthur V. Belendiuk, d/b/a Calypso Communications, to substitute Channel 267B for Channel 246B at Charlotte Amalie, Virgin Islands (RM-8027), IS DENIED.

16. IT IS FURTHER ORDERED, That, at their request, the counterproposal jointly filed by El Mundo Broadcasting Corporation, Estereotempo, Inc., Radio Redentor, Inc. and Aurio Matos, to substitute Channel 287B1 for 288A at Aguada, Puerto Rico and to reallot Channel 281B from Utuado to Gurabo, Puerto Rico (RM-8183), IS DISMISSED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

[17] The coordinates for Channel 267B at Cruz Bay are North Latitude 18-21-31 and West Longitude 64-58-21.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MEDIA/COMMUNICATIONS
PARTNERS LIMITED PARTNERSHIP
(Transferor)

and File No. BTCCT-941021KF

CC/ABC ACQUISITION IV CORP.
(Transferee)

For Consent to the Transfer of
Control of License of Television
Station WTVG(TV), Toledo, Ohio

MEDIA/COMMUNICATIONS
PARTNERS LIMITED PARTNERSHIP
AND SJL/KSN LIMITED
PARTNERSHIP
(Transferor)

and File No. BTCCT-941021KG

CC/ABC ACQUISITION I CORP.
(Transferee)

For Consent to the Transfer of
Control of License of Television
Station WJRT-TV, Flint, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1995; Released: July 26, 1995

By the Commission: Commissioner Barrett concurring and issuing a statement.

1. The Commission has before it an unopposed application to transfer control of the license of Station WTVG(TV), Toledo, Ohio from Media Communications Partners Limited Partnership ("Media Partners") to Capital Cities/ABC Acquisition Corp. IV, a subsidiary of Capital Cities/ABC, Inc. ("CC/ABC"), and an application to transfer control of the license of Station WJRT TV, Flint, Michigan from Media Partners and SJL/KSN Limited Partnership to Capital Cities/ABC Acquisition Corp. I, a subsidiary of CC/ABC, Inc.[1] CC/ABC, Inc. is the licensee of WJR-AM, Detroit, Michigan.[2] The 2mV/m ground wave contour of this radio station completely encompasses Toledo, Ohio, the WTVG(TV) community of license, as well as Flint, Michigan, the WJRT-TV community of license. Because the common ownership of a television and radio station under these circumstances violates the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(c), the transferees seek permanent waivers of this rule.

2. In our *Amendment of Section 73.3555, Second Report and Order*, 4 FCC Rcd 1741, *recon. in part*, 4 FCC Rcd 6489 (1989), we relaxed our one-to-a-market rule by introducing waiver standards. At that time, we also indicated that we would presumptively favor waiver requests involving station combinations serving the top 25 markets where they had at least 30 separately owned, operated, and controlled broadcast licensees or "voices" after creation of the proposed combination. *See* 47 C.F.R. §73.3555, Note 7. Further, we noted that we would favor requests involving "failed" broadcast stations, defined as stations that have not operated for a substantial period of time, such as four months, for example, or that are involved in bankruptcy proceedings . *Id.* We evaluate waiver requests not meeting either standard on a case-by-case basis based on five criteria, including: 1) the potential public service benefits of common ownership of the facilities, such as the economies of scale, cost savings and programming and service benefits; 2) the types of facilities involved; 3) the number of media outlets already owned by the applicant in the relevant market; 4) any financial difficulties involving the station(s); and 5) issues pertaining to the level of diversity and competition within the affected market. *See Second Report and Order*, 4 FCC Rcd at 1753-54.

3. CC/ABC argues that waiver would be justified under the five factor analysis. Preliminarily, CC/ABC notes that WJR is considered to be in the Toledo and Flint markets because of its expansive reach, despite the fact that these stations are all in separate Designated Market Areas ("DMA")[3] located miles apart. Given the geographic separation involved, the quantifiable efficiencies that often result from the stations sharing facilities and certain resources with each other, and that typically form a basis for waiver of the one-to-a-market rule, are not available in this case. Nevertheless, with respect to the first criteria, CC/ABC claims that the waiver should be granted because the proposed combinations would still result in significant savings to CC/ABC and substantial benefits to the public. CC/ABC notes that WTVG(TV) and WJRT-TV, as members of the Capital Cities television station group, will have

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[1] Southern Broadcast Corporation of Sarasota originally filed petitions to deny these applications. On March 14, 1995, petitioner filed a joint petition seeking withdrawal of the petitions and approval of a settlement agreement between it and ABC. That petition has been granted. We have reviewed the allegations raised in the petitions to deny and find that they do not present any substantial and material questions of fact warranting further inquiry.

[2] On May 11, 1995, Pappas Stations Partnership ("Pappas") submitted a request to condition grant of the transfer of WJRT-TV on the outcome of ongoing litigation involving CC/ABC and Pappas Telecasting Incorporated, one of the general partners of Pappas. The Commission does not require applicants to report pending suits, because it considers such information presumptively irrelevant to an applicant's character qualifications, *Policy Regarding Character Qualifications in Broadcast Licensing*, 7 FCC Rcd 6564, 6565 (1992). Pappas has made no showing to rebut that presumption in this case. Accordingly, we will not make our action here conditional on the outcome of this litigation.

[3] Throughout its waiver request, CC/ABC uses A.C. Nielsen's DMA statistics rather than Arbitron's Area of Dominant Influ-

access to the company's managerial, legal, auditing and corporate resources, as well as its expertise in local news programming. Additionally, according to CC/ABC, both WTVG and WJRT would enjoy an estimated 20% discount in the purchase of capital equipment because CC/ABC buys equipment in large quantities for its member stations. The stations will also enjoy efficiencies and cost savings through access to a common national advertising sales group.

4. Additionally, CC/ABC asserts that the proposed combination will result in public service and programming benefits. It notes that CC/ABC television and radio stations produce a substantial quantity of local news and public affairs programming, run public service announcement campaigns, and often participate in the company's job training and internship programs. CC/ABC also argues that inclusion of WTVG and WJRT in the CC/ABC television group will result in programming benefits to the stations involved in these waiver requests, as well as to other CC/ABC stations, by contributing to the network's ability to offer diverse programming on a cost-effective basis and by strengthening the news gathering operations of its stations. In particular, CC/ABC places emphasis on the existence of a Washington bureau operations manager who works directly for the owned stations and has at her disposal an extended news gathering crew. The news directors of each station and the Washington bureau operations manager talk with each other everyday via conference call to decide how the Washington crew should be deployed to produce news stories of interest to the stations. In "addition to assisting in the gathering and production of news of national interest, CC/ABC claims that the presence of owned stations in various markets allows the network to better cover stories of regional interest. Finally, regarding the radio-television combination, CC/ABC notes that although the WJR news staff would not be employed in the operation of either WTVG or WJRT, the radio station's knowledge and familiarity with the relevant issues and persons could contribute to both WTVG and WJRT's news and public affairs service to the Toledo and Flint areas, respectively.

5. Second, regarding the technical facilities involved, CC/ABC notes that WTVG(TV) is a VHF station, which operates on Channel 13 with 316 kW effective radiated visual power ("ERP") maximum from a directional antenna with a height of 305 meters above average terrain ("HAAT"). WJRT-TV operates on Channel 12 with 316 kW ERP maximum from a nondirectional antenna with a height of 287 meters HAAT. CC/ABC also notes that one other commercial VHF and one commercial UHF station licensed to communities within the Toledo DMA have coverage contours comparable to those of WTVG(TV), Toledo, and that one other commercial VHF station, and one commercial UHF station licensed to communities within the Flint-Saginaw-Bay City DMA have coverage contours comparable to or greater than those of WJRT-TV, Flint. With respect to WJR, it is a 50kW Class 1A clear channel AM station which, notes CC/ABC, makes it a powerful station within the Detroit market.

6. Third, according to their waiver requests, other than the stations involved in this case, CC/ABC has no other attributable interest in broadcast facilities in the same metro area as the stations involved in this request. Next, CC/ABC states that the fourth criterion, concerning financial difficulties involving the stations, does not apply to WJR-AM, WTVG(TV) or WJRT-TV.

7. Finally, the fifth factor in this analysis considers the effects of the proposed combination on diversity and competition in the relevant markets. CC/ABC urges that, given the nature of the Toledo and Flint markets, grant of this waiver would not adversely affect either competition or diversity. With respect to the WTVG(TV), Toledo and WJR-AM, Detroit combination, CC/ABC asserts that the stations are in separate markets. The applicant notes that Toledo and Detroit are 55 miles apart, and that WTVG(TV) is in the Toledo DMA, ranked 63rd in the nation, while WJR-AM is in the Detroit DMA, the 9th largest market. Both stations are also part of separate television and radio metro areas. Of WJR's 79,500 person average audience of persons 12 and older from 6:00 a.m. to midnight, 75% are from the Detroit radio metro, while only four percent, or 3,400 people, are from the Toledo radio metro. Additionally, CC/ABC submits the affidavit of the President of a corporation that acts as the media representative for approximately 1700 radio stations in the United States and the affidavit of the President and General Manager of WJR-AM. In these affidavits, both men claim that advertisers consider the Toledo and Detroit markets to be distinct and separate rather than competitive. Regarding the issue of diversity, CC/ABC notes that the Toledo DMA serves 408,000 households, of which approximately 67% are wired for cable. In addition to WTVG(TV), the Toledo market is also served by three other commercial and one noncommercial television station, all of which are separately owned.[4] Furthermore, 15 radio stations are licensed to cities within the Toledo television metro area, ten of which are separately owned. CC/ABC notes that WJR-AM is one of many stations that spill into Toledo from other markets. Lastly, the Toledo area produces 11 local newspapers, and receives 12 national and regional newspapers originating outside the Toledo DMA.

8. Similarly, CC/ABC argues that WJRT-TV and WJR-AM are in separate markets. WJRT-TV is located in the Flint-Saginaw-Bay City DMA, which is ranked 60th in the United States. Flint is 64 miles from Detroit. Moreover, according to CC/ABC, both stations are part of separate television and radio metro areas. Of WJR's average audience of persons 12 and older from 6:00 a.m. to midnight, only seven percent, or 5,300 people, are from the Flint radio metro. Once again, CC/ABC submitted affidavits by the same two individuals claiming that advertisers consider the Flint and Detroit markets to be distinct and separate rather than competitive. CC/ABC also argues that approving the combination will not harm diversity. It notes that the Flint-Saginaw-Bay City serves 448,000 households, of which approximately 59% are wired for cable. In addition to WJRT-TV, four other commercial and three noncommercial television stations with four satellites, all of

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ence ("ADI"). We will accept the applicant's showing using the Nielsen statistics since Arbitron no longer updates its ADI lists. *See Further Notice of Proposed Rule Making* in MM Docket No. 91-221 and MM Docket No. 87-8, FCC 94-322, at fn.59 released January 17, 1995), 1995 WL 40376.

[4] The commercial stations are WTOL-TV, WNWO-TV, and WUPW. The noncommercial station is WGTE-TV.

which are separately owned, serve the area.[5] Furthermore, 23 radio stations are licensed to cities within the Flint-Saginaw-Bay City television metro area, 19 of which are separately owned. CC/ABC notes that WJR-AM is one of many stations that spill into Flint from other markets. Finally, at least seven newspapers originate in the Flint-Saginaw-Bay City market.

9. Lastly, with respect to the diversity argument, CC/ABC argues that the stations involved in these waiver requests are only in the same market in a "marginal and technical sense." It states that WJR is not in the television metro area of either WTVG or WJRT. Nor is either station within WJR's DMA or Arbitron's Area of Dominant Influence. Further, CC/ABC points out that WJR would not qualify under Section 73.3555(c), note 7 as one of the media voices in either Toledo or Flint for the purposes of calculating the number of media voices in the WTVG and WJRT communities of "license, and thus should not be considered in determining whether common ownership has a negative impact on diversity.

10. Based on its assertion that the stations involved in these waiver requests are only in the same market, as defined by the one-to-a-market rule, in a "marginal and technical sense," CC/ABC argues that application of the rule to these situations would not further the objectives that the rule was designed to accomplish, namely, preservation of diversity and the prevention of undue concentration of economic power in the affected markets. To this end, the applicant once again notes that Note 7 to Section 73.3555(c) dictates that WJR, Detroit, does not count as one of the media voices in either Toledo or Flint, and therefore argues that it should not count in determining whether common ownership has a negative impact on diversity. As discussed above, CC/ABC also asserts that WJR, WTVG and WJRT are all in separate broadcast markets, as defined by both A.C. Nielsen and Arbitron, and as confirmed by audience statistics and advertising purchasing behavior. Thus, CC/ABC concludes that where a station's signal reaches a market under the technical 2mV/m definition of the "one-to-a-market" rule, but does not place it in that market under the rule's diversity definition, application of the rule would not serve the rule's purpose, and waiver is consequently appropriate.

11. *Discussion.* We have reviewed CC/ABC's waiver requests and concur in CC/ABC's contention that application of the one-to-a-market rule in the unusual circumstances of this case is not appropriate. The evidence before us, including the widely separated locations of the relevant markets, the minimal local presence of WJR in the Toledo and Flint television markets and the distorting effect of WJR's exceptionally wide 2mV/m coverage contour, supports the conclusion that permanent waivers of the one-to-a-market rule to permit common ownership of WTVG(TV), WJRT-TV and WJR-AM would not result in an appreciable adverse impact on the level of diversity or competition in the affected markets. Waivers are justified in situations in which application of a general rule would not be in the public interest if extended to an applicant who proposes service that will not undermine the policy served by the rule. *See Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

12. In our *First Report and Order*, we stated that the objective of the one-to-a-market rule is "to maximize diversification of program and service viewpoints, as well as to prevent any undue concentration of economic power contrary to the public interest." *First Report and Order*, in MM Docket 18110, 22 F.C.C.2d 306, 314 (1970). In our *Second Report and Order*, we recognized that we could liberalize the one-to-a-market rule's prohibition against common ownership of radio and television stations in the *same market* through the introduction of several waiver standards, while still preserving the rule's fundamental objectives. In this case, it appears that application of the rule to the stations CC/ABC seeks to commonly own is not dictated by any need to preserve diversity or economic competition: rather it is the anomalous result of the extraordinary groundwave coverage of a clear channel AM station and the broad threshold standard used to trigger the rule -- encompassment of the television station's community of license by the radio station's 2mv signal contour. All other indications suggest that neither WJR and WTVG nor WJR and WJRT compete in the *same market.*

13. As CC/ABC has noted, Detroit is 55 miles from Toledo; Detroit and Toledo are separate DMA markets (ranked 9th and 63rd, respectively); WJR draws only four percent of its audience from the Toledo radio metro market; and Detroit and Toledo are considered separate advertising markets. Similarly, Detroit is some 64 miles from Flint; Detroit and Flint are separate DMA markets (Flint is ranked 60th); WJR draws only seven percent of its audience from the Flint radio metro market; and Detroit and Flint are considered separate advertising markets.

14. Moreover, the one-to-a-market rule itself suggests the separateness of the markets involved here. Note 7 to Section 73.3555 prescribes the basis for determining which stations should be counted as "in the market" for purposes of waiving the rule under the top 25 market/30 voice standard. This standard contemplates a presumptive grant of waiver requests in the top 25 markets where 30 separately owned, operated and controlled broadcast voices would remain after the proposed combination of stations is complete. The standard is premised on the view that diversity and competition are not likely to be injured by joint operation of stations in a market with 30 separate broadcast competitors. To determine which stations contribute to "diversity and competition" under this standard, the rule looks to TV stations licensed to the Arbitron TV ADI and to radio stations in the TV metro market. Under this test, WJR would not be counted in either Toledo or Flint as a market station.

15. Considering this, as well as the other factors discussed above that indicate that the stations are in separate markets, each with numerous other media outlets, we believe that it would not serve the public interest to find that the common ownership of these stations would affect the diversity of, or result in undue economic concentration in, these markets. We note, as well, that CC/ABC has made

[5] The commercial stations are WEYI-TV, WNEM-TV, WSMH and WAQP. The noncommercial stations are WCMU, retransmitted by satellite stations WCML-TV, WCMW, and WCMV, and WUCM-TV, retransmitted by satellite stations WUCX-TV, and WFUM.

showings concerning several of the traditional factors considered in one-to-a-market cases. Although common ownership of the radio and television stations does not evidence significant economic efficiencies, this is a predictable result of the very geographic separations among the relevant markets which prompt our conclusion that WJR, WTVG(TV), and WJRT-TV do not serve common markets. Second, although both waiver requests involve stations with substantial facilities, because each market has other stations with comparable facilities, there is no suggestion that the combined ownership of WJR and these stations will present issues of market concentration inconsistent with the public interest. Moreover, CC/ABC has stated that it has no other attributable media interests in the metro areas of the stations involved in this case. Furthermore, with respect to diversity and competition in Toledo and Flint, CC/ABC has shown that 14 separately owned broadcast facilities serve Toledo and 26 serve Flint, while both communities enjoy numerous other media competitors, including cable television service (67% penetration in the Toledo DMA and 59% in the Flint-Saginaw-Bay City DMA) and an abundance of print sources. Indeed, as noted by CC/ABC, WJR orients its program service to its own metro area, and the radio station attracts very minimal audiences in Toledo and Flint. Thus, while these stations technically fall under our one-to-a-market rule, application of the rule to this case – a case in which the proposed transactions will not undermine the two policy objectives served by the rule – is not justified. *See Wait Radio v. FCC*, 418 F.2d 1153.[6]

16. We conclude that in the unusual circumstances of these cases, grant of the requested waivers is warranted. Additionally, we find the applicants are fully qualified and that grant of the proposed transfers would serve the public interest, convenience and necessity.

17. Accordingly, IT IS ORDERED that the request for waivers of the Commission's one-to-a-market rule, Section 73.3555(c), to permit common ownership of television stations WTVG(TV), WJRT-TV and radio station WJR-AM, ARE GRANTED.

18. IT IS FURTHER ORDERED, That the application for consent to transfer of control of WTVG(TV) from Media Communications Partners Limited Partnership to Capital Cities/ABC Acquisition Corporation IV, and the application for consent to transfer of control of WJRT-TV from Media Communications Partners Limited Partnerships and SJL/KSN Limited Partnership to Capital Cities/ABC Acquisition Corporation I, ARE GRANTED.[7]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[6] CC/ABC noted that it has entered into an agreement to acquire nonvoting stock, which is convertible into voting stock, amounting to less than 13% of the equity in Young Broadcasting, Inc. ("Young"), which owns seven television stations, including WLNS-TV, Lansing Michigan. Additionally, we have consented to Young's acquisition of three more stations. CC/ABC is also obtaining warrants to acquire convertible, nonvoting Young stock which, if exercised, would bring its percentage of the equity to 19.4%. Both WTVG(TV) and WJRT-TV are in markets adjacent to that of WLNS-TV, Lansing, Michigan. Although the Grade A contour of WJRT-TV does not reach Lansing and the Grade A contour of WLNS-TV does not reach Flint, their Grade A contours do overlap. Similarly, the Grade A contours of WLNS-TV and WTVG(TV) do not reach the other station's city of license, but each station's Grade A contour overlaps the Grade B contour of the other station. Since, based on our rules, the interest in Young is not attributable to CC/ABC, 47 C.F.R. §73.3555 Note 2(f), and since these stations are not in the same metro market, CC/ABC's ownership of the stock does not implicate the third factor regarding the applicant's ownership of other attributable interests within the affected markets.

Nor does this stock ownership raise an issue under our cross-interest policy. CC/ABC represents that the acquisition would have no significant effect on CC/ABC's competitive incentives as the owner of WJRT-TV and WTVG(TV), since none of the stations share a significant percent of the audience of the other stations and since the net revenues for the Lansing station, located in the Lansing DMA, comprise only 10.6% of Young's revenues. Furthermore, CC/ABC claims that the stock ownership would have no adverse effect on the diversity of service provided by the three stations because WLNS-TV, a CBS affiliate, has just entered into a long-term affiliation with CBS, and because CC/ABC will not have any control over the programming of WLNS-TV. Based on these representations, we find that the interest in Young does not threaten the objectives supporting our cross-interest policy. *See, e.g., Telemundo Group, Inc.*, FCC 94-341 (released December 23, 1994), 1994 WL 716715 (December 23, 1994) at ¶ ¶18-23.

[7] Question 14 of Transferee's section of the above-captioned application for transfer of control requires that the transferee report any adverse final actions "taken by any court . . . with respect to the applicant or parties to this application in a civil . . . proceeding, brought under the provision of any law related to . . . fraudulent statements to another governmental unit." In response to this question, CC/ABC discusses *Shepherd v. American Broadcasting Companies, Inc.*, which includes findings of litigation-related misconduct against CC/ABC. This case is presently under appeal. *Shepherd v. American Broadcasting Companies, Inc.*, No. 88-954 (Memorandum Opinion and Order, D.D.C. April 15, 1992), *motion for recon. granted in part and denied in part*, (Memorandum Opinion and Order, September 3, 1993), *judgment further modified*, (Memorandum Opinion in Support of Final Judgment, June 13, 1994), *notice of appeal docketed*, July 7, 1994. Our action here granting the above-captioned application does not prejudice whatever action, if any, the Commission may deem appropriate in connection with the *Shepherd* findings, which are presently under review in connection with pending applications for renewal of license filed by Capital Cities and its subsidiaries.

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: In re Application of WTVG(TV), (Channel 13, NBC), Toledo, Ohio and WJRT-TV (Channel 12, ABC), Flint, Michigan for Transfers of Control. (File No. BTCCT-941021KF)
(File No. BTCCT-941021KG)

In this Memorandum Opinion and Order, the Commission grants Capital Cities/ABC Acquisition Corp. IV ("CC/ABC"), a waiver request in order to enable CC/ABC to receive transfer of control of licenses of station WTVG (Channel 13), Toledo, Ohio and station WJRT (Channel 12), Flint, Michigan. While approving of the assignment of the subject licenses, I am reluctant to endorse yet another waiver of the Commission's one-to-a-market rule. As such, I concur in this decision.

As I have stated on numerous occasions, my concern stems from the repeated modification of the Commission's rules through the waiver process.[1] I now find it necessary to reiterate my concern. In this proceeding CC/ABC requests a waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(c). The one-to-a-market rule exists to promote maximum diversification of program and service viewpoints and to prevent an undue concentration of economic power contrary to the public interest.[2] Notwithstanding the Commission's finding that waiver of the one-to-a-market rule, would be consistent with both the public interest and previous precedent, it is my opinion that the Commission's actions serve only to circumvent our established ownership regulations by way of a waiver.

My concurrence today is based on the unique circumstances of this case. Here, the application of the one-to-a-market rule is not invoked by any particularly identifiable need to preserve diversification or economic competition; rather, it is the unique result of the extraordinary groundwave coverage of a clear channel AM station and the broad 2mV/m signal contour threshold standard used to trigger the rule. Furthermore, the separated locations of the relevant markets and the minimal local presence of WJR in the Toledo and Flint television markets make it reasonable for me to support this permanent waiver of § 73.3555(c) despite my continued misgivings about allowing the waiver process to effectively modify the Commission's ownership rules.

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[1] See Pegasus Broadcasting, 7 FCC Rcd 8625 (1992) (Dissenting Statement of Commissioner Andrew C. Barrett). See also In re: ACT III Broadcasting of Buffalo, 8 FCC Rcd 885 (1993) (Dissenting Statement of Commissioner Andrew C. Barrett); Sunshine

Television, Inc., 8 FCC Rcd 4428 (1993) (Statement of Commissioner Andrew C. Barrett - Concurring in Part); H&C Communications, Inc., 73 RR 2d 1108 (1993) (Concurring Statement of Andrew C. Barrett); In re Application of Salt of the Earth Broadcasting, Ltd., 9 FCC Rcd 3621 (1994) (Concurring Statement of Commissioner Andrew C. Barrett); In re Application of Sam Jones, Jr., FCC Rcd (1995) (Concurring Statement of Commissioner Andrew C. Barrett).

[2]See Multiple Ownership Rules, 22 FCC 2d 306,307 (1970), recon. granted in part, 28 FCC 2d 662 (1971).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HASKELL SCHOOL DISTRICT Warner, Oklahoma	FILE NO. BPLIF-920713DA
EAST CENTRAL UNIVERSITY McAlester, Oklahoma	FILE NO. BPLIF-920312DA
ENID PUBLIC HIGHER EDUCATION TRUST AUTHORITY Henryetta, Oklahoma	FILE NO. BPLIF-930219DW

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1-D4.

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1995 **Released: July 26, 1995**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Haskell School District (Haskell), East Central University (University) and Enid Public Higher Education Trust Authority (Enid), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the areas of Warner, McAlester and Henryetta, Oklahoma, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). All of the applicants are qualified to be ITFS licensees. Haskell is a school district that is accredited by the Oklahoma State Department of Education and that is applying to serve students enrolled at schools within its jurisdiction. University, an educational institution, is accredited by the North Central Association of Schools and Colleges and is applying to provide ITFS service to its own enrolled students. Enid, an educational institution that is located in Enid, Oklahoma, approximately 130 miles from Henryetta, has submitted the requisite letters of intended use from accredited schools that will use its service and has demonstrated the establishment of a local programming committee in the community.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels in the same area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group,where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism: Haskell is entitled to four points because it proposes to serve the formal educational needs of students enrolled at schools within its jurisdiction. University is also entitled to four points because it proposes to serve the formal educational needs of its own students. As stated above, Enid is not located in the area it proposes to serve and, thus, is not entitled to points for being a local applicant.

Accreditation: Haskell is entitled to three points because it is accredited by the Oklahoma State Department of Education. University is entitled to three points because it is accredited by North Central Association of Schools and Colleges. Although Enid proposes to serve accredited schools, a factor satisfying is basic eligibility, it is not an

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or at least 41 hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

accredited entity in its own right in the area its proposes to serve, the factor necessary for earning merit points under the accreditation criterion. Therefore, Enid is not entitled to any points by this measure. See *Quachita Academy of Arts and Science*, 9 FCC Rcd 7903 (1994).

Four-Channel Limitation: None of the applicants is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming: ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992). Haskell's illustrative schedule and grid propose an average of 24.375 hours of ITFS programming per channel per week, all of which is to be formal educational programming. Consequently, Haskell is entitled to one programming merit point. University's grid proposes an average of 40.5 hours of ITFS programming per channel per week, of which 12.75 hours are formal, while its illustrative schedule proposes 47.5 hours of programming per channel per week, of which 11.875 hours are formal. Because the amount of programming specified by University in its programming grid does not reach the threshold amount at which merit points are awarded, University is entitled to no programming merit points. Likewise, Enid's grid proposes an average of 40 hours of ITFS programming per channel per week, of which 12.5 hours are formal. However, its illustrative schedule proposes an average of 22.5 hours of ITFS programming per channel per week, of which 12.5 hours are formal. Since neither Enid's schedule nor its grid establishes the threshold amount at which merit points are awarded, Enid is entitled to no programming merit points.

E- and F- Channel Group Relocation: None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, no applicant is entitled to the one point for such applicants.

Total: Haskell is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. University is entitled to four points for being local, three points for being accredited and two points for observing the four-channel limitation, for a total of nine points. Enid is entitled only to a total of two points for observing the four-channel limitation. Because the applications of Haskell and University are mutually exclusive only with the application of Enid and because they have the greatest number of points, Haskell and University are the tentative selectees.

OTHER MATTERS

5. Haskell and University propose to lease their excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicants have submitted copies of their leases with Rural Vision Central, Inc. and East Oklahoma Wireless Cable, Inc., respectively, which conform in all respects with our requirements.

6. No petitions to deny or informal objections have been filed against the applications of Haskell or University, and we find Haskell and University fully qualified to be ITFS licensees. We also conclude that grant of their applications would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Enid Public Higher Educational Trust Authority (BPLIF-930219DW) IS DENIED, and the applications of Haskell School District (BPLIF-920713DA) and East Central University (BPLIF-920312DA) ARE GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HOUSTON COUNTY BOARD OF EDUCATION Dothan, Alabama	File No. BPLIF-920214DM
COFFEE COUNTY BOARD OF EDUCATION Ariton, Alabama	File No. BPLIF-920506DA
GENEVA CITY SCHOOLS Elba, Alabama	File No. BPLIF-930219EG

For Construction Permit and License in the Instructional Television Fixed Service on Channels B1-B4.

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1995; Released: July 26, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Houston County Board of Education (Houston), Coffee County Board of Education (Coffee) and Geneva City Schools (Geneva), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels B1-B4 in the areas of Dothan, Ariton and Elba, Alabama, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). All of the applicants are qualified to be ITFS licensees. Houston and Coffee are school boards that are accredited by the Southern Association of Colleges and Schools and that propose to serve the formal educational needs of students enrolled at schools located both within and outside their jurisdictions. Geneva is a school system accredited by the State Board of Education and proposes to serve the formal educational needs of students enrolled in schools located within its jurisdiction.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service -Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. All of the applicants are entitled to four points because they propose to offer formal educational programming to serve students enrolled in schools located within their respective jurisdictions.

Accreditation. Each applicant is entitled to three points for accreditation. Houston and Coffee are accredited by the Southern Association of Colleges and Schools, whereas Geneva is accredited by the State Department of Education.

Four-Channel Limitation. None of the applicants is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and programming "grid." Where the amounts and types of programming proposed in

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Houston's illustrative schedule and programming grid propose an average of 21 hours of formal educational programming per channel per week. Consequently, Houston is entitled to one programming merit point. Likewise, Coffee's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational ITFS programming per channel per week and it too is entitled to one programming merit point. Geneva's illustrative schedule proposes an average of 25 hours of ITFS programming per week, all of which is designated as formal, while its programming grid proposes an average of 21 hours of formal educational programming. Notwithstanding the inconsistency, Geneva is entitled to one programming merit point.

E- and F- Channel Group Relocation. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, no applicant is entitled to the one point for such applicants.

Total. Each of the applicants is entitled to a total of ten points: four points for being local; three points for being accredited; two points for observing the four-channel limitation; and one point for proposing at least 21 hours of formal educational programming per channel per week. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523*, (*Third Report and Order*), 4 FCC Rcd 4830 (1989); *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990) (*Third Report Recon.);* and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[3] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. Discounting the student enrollment figures for receive sites that were not specified by the "B" cut-off date of June 11, 1993, Houston has provided documentation showing that a total of 21,256 students will be served at receive sites which are located both within and outside its jurisdiction. Coffee has claimed that it will serve a total of 14,009 students at its receive sites. However, Coffee failed to submit letters of intended use by the "B" cut-off date from receive sites outside of its jurisdiction. Consequently, Coffee can be credited only with a total of 1,288 students, the number enrolled at schools within its jurisdiction. Likewise, Geneva has failed to submit letters of intended use from receive sites outside of its jurisdiction. Although Geneva claimed a total of 4,798 students that it would serve, it can be accredited only with the 707 students enrolled at schools within its jurisdiction. Because the number of students credited to Coffee, 1,288, and to Geneva, 707, is each less than 80 percent of the number of students credited to Houston, 21,256, Houston is the tentative selectee.

OTHER MATTERS

7. Houston proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Wireless Cable Television, which conforms in all respects with our requirements.

8. No petitions to deny or informal objections have been filed against Houston's application, and we find Houston fully qualified to be an ITFS licensee. We also conclude that grant of Houston's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the applications of Coffee County Board of Education (BPLIF-920506DA) and Geneva City Schools (BPLIF-930219EG) ARE DENIED, and the application of Houston County Board of Education (BPLIF-920214DM) IS GRANTED.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

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[3] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report Recon., supra*. Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and indicate the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

UNIVERSITY OF NORTHERN ALABAMA Muscles Shoals, Alabama	FILE NO. BPLIF-920221DA
DALE COUNTY BOARD OF EDUCATION Tharptown, Alabama	FILE NO. BPLIF-920320DP

For Construction Permit and License in the Instructional Television Fixed Service on Channels A1-A4.

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1995; Released: July 26, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of University of Northern Alabama (University) and Dale County Board of Education (Dale), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels A1-A4 in the areas of Muscles Shoals and Tharptown, Alabama, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. University is an educational institution that is accredited by the Southern Association of Colleges and Schools and that proposes to serve its own students. Dale, a school board that is located in Ozark, Alabama, approximately 240 miles from Tharptown, has submitted the requisite letters of intended use from accredited schools that will use its service and has demonstrated the establishment of a local programming committee in the community.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels in the same area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. University is entitled to four points because it proposes to serve the formal educational needs of its own enrolled students. As stated above, Dale is not located in the area it proposes to serve and, thus, is not entitled to points for being a local applicant.

Accreditation. University is entitled to three points because it is accredited by the Southern Association of Colleges and Schools. Although Dale proposes to serve accredited schools, a factor satisfying its basic eligibility, it is not an accredited entity in its own right in the area it proposes to serve, the factor necessary to earning merit points under the accreditation criterion. Therefore, Dale is not entitled to any points by this measure. See *Quachita Academy of Arts and Science*, 9 FCC Rcd 7903 (1994).

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or at least 41 hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Instructional Programming. The Commission's primary focus in evaluating an ITFS applicant's programming proposal is directed to the illustrative schedule and programming grid wherein the applicant details the formal educational and other ITFS programming it intends to provide. Thereafter, we look to any excess capacity lease agreement to ensure that the amount of programming to be transmitted, that is credited to the applicant, is demonstrably permitted under the lease. See *Espanola Public Schools*, 10 FCC Rcd 919 (1994).

University's illustrative schedule and programming grid propose an average of 61 hours of ITFS programming per channel per week, of which 25 hours is formal educational programming. Its excess capacity lease, however, allows University a maximum of 40 hours of such programming. Consequently, University is entitled only to one programming merit point. See *Harlem Consolidated School District #122*, 9 FCC Rcd 7927 (1994). In contrast, Dale's illustrative schedule and programming grid propose an average of 24.375 hours of ITFS programming per channel per week, none of which is formal educational programming. Because the amount of programming proposed does not meet the threshold amount at which merit points are awarded Dale is not entitled to any programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither applicant is entitled to the one point for such applicants.

Total. University is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, forh)a total of ten points. Dale is entitled only to a total of two points for observing the four-channel limitation. Thus, the tentative selectee is University.

OTHER MATTERS

5. University proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Shoals Wireless, several of whose provisions do not comply with the Commission's requirements for such agreements. Specifically, the lease does not provide for the licensee's right to purchase the ITFS equipment at its fair market value in the event the lease is terminated as a result of some action on the part of the excess capacity licensee. We have consistently maintained that the licensee be permitted the opportunity to purchase the ITFS equipment necessary to maintain operation in the event of such termination. See *Turner Independent School District*, 8 FCC Rcd 3153, 3155 (1993). Further, the lease appears to give Shoals Wireless unilateral authority to change the location of the transmission site regardless of the service provided to the receive sites of the licensee. We view this as inconsistent with the responsibility of the ITFS licensee to ensure the adequacy of its service. *Second Report and Order*, 101 FCC 2d at 90. Although inconsistent with our requirements for excess capacity leases, these provisions neither reflect on the applicant's basic or comparative qualifications, nor preclude grant of an authorization. Nevertheless, the authorization of University will be conditioned upon conformity of the lease to Commission requirements. See *Highland Independent School District*, 9 FCC Rcd 3162, 3163 (1994).

6. No petitions to deny or informal objections have been filed against University's application, and we find University fully qualified to be an ITFS licensee. We also conclude that grant of University's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Dale County Board of Education (BPLIF-920320DP) IS DENIED, and the application of University of Northern Alabama (BPLIF-920221DA) IS GRANTED, subject to the condition that, within 30 days of the release of this Order, University shall submit to the Chief, Distribution Service Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BIG BEN COMMUNICATIONS, INC. (Assignor) — File No. BALH-941202GE

and

FLINN BROADCASTING CORPORATION (Assignee)

For Consent to the Assignment of Station KFTH(FM), Marion, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 1995 **Released: July 27, 1995**

By the Commission:

1. The Commission has before it the above-captioned application for consent to the assignment of station KFTH(FM), Marion, Arkansas, from Big Ben Communications, Inc. ("Big Ben") to Flinn Broadcasting Corporation ("Flinn"). Flinn is the permittee of UHF television station WFBI-TV (Ind.) Memphis, Tennessee.[1] Flinn is also the licensee of WNWZ(AM), Germantown, Tennessee, and WHBQ(AM), Memphis, Tennessee. Since the Grade A contour of WFBI-TV encompasses all of Marion, Arkansas, KFTH(FM)'s community of license, Flinn has also submitted a request for waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(c).[2] The application is unopposed, and will result in Flinn owning four stations in the Memphis market. As set forth below, we will grant the application and the waiver request.

WAIVER REQUEST

2. Flinn bases its one-to-a-market waiver request on the Commission's waiver standards adopted in *Second Report and Order* in MM Docket No. 87-7 (*"Second Report and Order"*), 4 FCC Rcd 1741 (1989), *recon. denied in part and granted in part*, (*"Second Report and Order Recon."*), 4 FCC Rcd. 6489 (1989).[3] Under these criteria, the Commission presumptively favors waiver requests involving station combinations serving the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed combination ("top 25 market/30 voice standard"). The Commission also favors waiver requests involving "failed" broadcast stations, that is, stations that have not been operating for a substantial period of time (*e.g.*, four months), or that are involved in bankruptcy proceedings. *See* 47 C.F.R. § 73.3555, n.7. Because Flinn's waiver request does not meet the top 25 market/30 voice standard or the failed-station standard, Flinn seeks review of its waiver request under the case-by-case standard also outlined in the *Second Report and Order*.[4] Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented; (2) the number of media outlets owned by the applicant in the relevant market; (3) the types of facilities involved; (4) the public service benefits that will arise from the joint operation of the facilities such as economies of scale, cost savings and programming and service benefits; and (5) the financial difficulties of the stations involved. *Second Report and Order* at 1753. In support of its waiver request, Flinn submits a detailed showing which addresses each of these five case-by-case factors.

3. *Competition and Diversity in the Market.* The first factor concerns the nature of the relevant market in light of the Commission's concerns about diversity and competition. Relevant indicia include the number of broadcast outlets, the number of separately owned and operated broadcast "voices" in the market, and the presence of cable and non-broadcast media. As to the number of broadcast stations, the Commission has held that, in the context of a one-to-a-market waiver, it will consider the relevant ADI (Arbitron Area of Dominant Influence) TV market for TV stations and the relevant TV metro market for radio stations. *See Second Report and Order*, 4 FCC Rcd. at 1760, n.101. Flinn states that Marion, Arkansas, is included within the Memphis, Tennessee ADI -- ranked 42nd in 1994 with 604,400 households -- and that the ADI contains 9 TV stations, including WFBI-TV, licensed to 9 separate owners. Flinn reports that in the Memphis TV metro market there are 25 AM stations and 23 FM stations licensed to 33 separate owners. There will be, therefore, 32 separately owned and operated broadcast stations after consummation of the proposed transaction. Flinn asserts that there are 23 cable operators serving the Memphis market with a cable penetration rate of 58%. In addition, Flinn claims that

[1] WFBI-TV is presently operating pursuant to program test authority.

[2] Section 73.3555(c) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station. *See* 47 C.F.R. § 73.3555(c).

[3] Since the principal community contour of KFTH(FM), WNWZ(AM), and WHBQ(AM) overlap, Flinn must also meet the requirements of the radio ownership rule found in 47 C.F.R. § 73.3555. Pursuant to this rule, one licensee may own up to two AM and two FM broadcast stations in a market if there are more than 15 stations in the relevant market and the combined audience share of the proposed commonly-owned radio stations is less than 25 percent. Flinn has demonstrated that there are at least 15 radio stations whose contours overlap the contours of the proposed commonly-owned radio stations and that the combined audience share of KFTH(FM), WHBQ(AM) and WNWZ(AM) in the relevant metro market is only 1.8 percent.

[4] Because Flinn's proposed acquisition invokes 47 C.F.R. § 73.3555(a), the local ownership limits of the Commission's multiple ownership rule, its waiver request is subject to the case-by-case standard, regardless of market size. *See* In re Revision of Radio Rules and Policies, *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd. 6387, 6394 n.40 (1992).

Memphis is served by 3 daily newspapers as well as 42 other periodicals. Flinn also notes that, in the Memphis area, 9 national magazines have a circulation rate of 20,000 households or more. Flinn concludes that the "intense market competition levels, combined with the existing diversity in the marketplace, guarantee that traditional FCC concerns regarding one-to-a-market waivers' are not present in this case."

4. *Number of Outlets Owned and Types of Facilities.* The proposed combination will result in Flinn owning one television station, two AM stations, and one FM station in the same market. Other than these broadcast stations, Flinn has no other media outlets in the Memphis market. WFBI-TV, an independent television station broadcasting "home-shopping" programming, is an UHF facility authorized to operate on Channel 50 at 1320 kW effective radiated power ("ERP") from an antenna height of 315 feet above average terrain ("HAAT"). WHBQ(AM) is a Class B facility operating directionally on 560 kHz at 5 kW daytime, 1 kW nighttime. WNWZ(AM) is also a Class B facility operating non-directionally on 1430 kHz at 2.5 kW. KFTH(FM) is a Class A facility operating on 107.1 MHz at 3.0 kW ERP from an antenna height of 328 feet HAAT. Flinn contends that KFTH(FM), WHBQ(AM) and WNWZ(AM) are not dominant radio stations in the Memphis market. In support, Flinn notes that, out of 25 stations, the Arbitron Spring 1994 Memphis Report ranks KFTH(FM) as number 20, WHBQ(AM) as number 22, and WNWZ(AM) as unrated, "thus making it at least the 26th-rated station in the market." With respect to the radio stations' technical facilities, Flinn states that in the Memphis market there are "at least seven" technically-superior AM stations to that of WHBQ(AM); "eight" technically-superior AM stations to that of WNWZ(AM); and that there are "at least nine" technically-superior FM stations to that of Class A station KFTH(FM).

5. *Benefits of Joint Operation.* Flinn contends that the proposed common ownership of KFTH(FM), WFBI-TV, WHBQ(AM) and WNWZ(AM) will result in "significant economies of scale, operating efficiencies and public interest benefits." Flinn estimates that the "critical savings in the areas of general and administrative, promotions, production, programming, accounting and advertising with respect to KFTH(FM) alone should total $117,450.00." Specifically, Flinn reports that $75,000 of that savings will result from WFBI-TV and KFTH(FM) sharing general and station managers. KFTH(FM) will have use of Flinn's "existing production facilities and staff," including utilizing Flinn's current sales staff. Flinn "anticipate|s| that the . . . secretaries and receptionists for |it|s current stations shall handle the KFTH(FM) duties through interlinked phone and computer set-ups," with some personnel being assigned to the KFTH(FM) site. Flinn estimates that $3,000 of the overall savings will come from the use of Flinn's accountant for KFTH(FM). Flinn asserts that the co-ownership of KFTH(FM), WFBI-TV, WNWZ(AM) and WHBQ(AM) will permit KFTH(FM) to take advantage of certain public service programs already established at Flinn's presently-owned stations.[5] Flinn additionally states that it intends to expand KFTH(FM)'s local news programming, as well as community bulletin board segments for the station. Upon grant of the subject waiver, Flinn will seek Commission approval to co-locate the KFTH(FM) main studio with its present facilities, thereby further increasing the efficiencies achieved by the combination of stations.

6. *Financial Difficulties.* Big Ben reports that KFTH(FM) has operated at a loss since 1992. According to financial statements submitted with the waiver request, KFTH(FM) sustained a loss of $44,028 in 1992; $122,927 in 1993; and $79,631 in 1994.[6] Big Ben also claims that KFTH(FM) has been on the market for two years and, during that time, has received only one offer in addition to Flinn's.[7] Flinn contends that the addition of KFTH(FM) to the Flinn stations will help to "stem the tide of financial losses which have afflicted all of the stations concerned." Flinn asserts that WFBI-TV, WHBQ(AM) and WNWZ(AM) have required "substantial and repeated capital infusions since they were acquired by Flinn." For the 1994 fiscal year, Flinn reports that the combined net operating loss for WHBQ(AM), WNWZ(AM) and WFBI-TV totalled $457,220, with WHBQ(AM) suffering a $179,662 loss; WNWZ(AM) a $175,104 loss; and WFBI-TV a $102,454 loss. Citing *Duncan's Radio Market Guide: 1995*, Flinn also contends that the proposed combination of stations represents only .9%, or $372,164, of the 1994 Memphis market revenues, which totalled $36,900,000. Flinn concludes that the acquisition of KFTH(FM) will aid the financial growth of the proposed combination by allowing Flinn to cross-promote the stations and to offer "enhanced rate packages'" to potential advertisers.

DISCUSSION

7. In evaluating a request for a waiver of the one-to-a-market rule, the Commission's goal "is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *Second Report and Order Recon.*, 4 FCC Rcd. at 6491.[8] We conclude that Flinn's showing in support of a waiver of the one-to-a-market rule meets our case-by-case criteria, that a waiver in this instance is consistent with the public interest, and that grant of the instant assignment application would not have an adverse effect on diversity and competition in the Memphis market.

8. Flinn conclusively demonstrates that the proposed combination will not create any undue concentration of ownership or control of broadcast media in the Memphis market. After the assignment is approved, the Memphis market will be served by 9 television stations, 19 FM

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[5] Flinn states that these "family" and "children's" programs include *Single Parenting in the 90's; Attention Deficit Disorders; How to Understand Your Child; Peer Pressure: Drugs, Alcohol and the Lost Adolescence; Divorce: You Are Not Alone;* and *Let's Talk About It.*

[6] Big Ben states that if depreciation had been included with these years, the documented losses would be greater.

[7] According to Big Ben, Gilliam Communications, Inc. ("Gilliam") also offered to purchase KFTH(FM), although the waiver request does not state why Big Ben declined Gilliam's purchase offer.

[8] Not all five factors under the case-by-case standard will be relevant in every case. *Second Report and Order Recon.*, 4 FCC Rcd. at 6491. *See also South Central Communications Corp.*, 5 FCC Rcd. 6697, 6698 (1990) (all five criteria need not be satisfied as a precondition to grant of a waiver).

stations and 21 AM stations.[9] *See Broadcasting and Cable Yearbook* (1994). Of those 49 broadcast stations (9 TV stations and 40 radio stations), 32 stations will remain separately owned and operated. *See id.* In addition, as Flinn has pointed out, other "voices" in the market are plentiful, including 3 daily newspapers and 23 cable operators with a cable penetration rate of 58%. The proposed combination of the relatively modest facilities involved here does not present issues of market dominance inconsistent with the public interest given the substantial competition in the Memphis market.

9. Flinn has also shown that joint ownership will create efficiencies resulting in significant cost savings and potential for enhanced programming and service benefits. In the past, the Commission has held that significant cost savings and economic efficiencies resulting in explicit service advantages are "precisely the type of public interest benefit from common station ownership which we envisioned as warranting a waiver of the one-to-a-market rule." *Great American Television and Radio Co.*, 4 FCC Rcd 6347, 6439 (1989). The waiver request indicates that the proposed combination will enable KFTH(FM) to avail itself of Flinn's production facilities and staff as well as expand its news, public affairs and local programming. Flinn also plans to combine general and station managers at KFTH(FM) and WFBI-TV, sales staff, secretarial and its receptionist pool, thereby achieving efficiencies not previously available to KFTH(FM). These efficiencies will result in a net savings of at least $117,450 and will benefit the financial condition of all of the facilities involved. This fact is especially compelling, since, as shown in the waiver request, each station in the proposed combination has experienced varying degrees of financial difficulty in the past. Station KFTH(FM), in particular, has lost more than $246,000 from 1992 through the end of 1994. The economic conditions of KFTH(FM) parallel those in other instances in which we have granted a waiver under the case-by-case standard. *See Burt H. Oliphant*, 10 FCC Rcd 2708 (1995) (radio station that would have suffered net loss in each year of operation but for the deferral of a principal's salary and other such measures); *see also Tulsa 23*, 5 FCC Rcd 727 (1990) (television station's financial history demonstrates net overall loss in each year of operation). Finally, we note that, aside from the subject stations, Flinn owns no other media in the Memphis market and that the subject stations are technically modest facilities and clearly will not dominate the market.

10. Accordingly, IT IS ORDERED, That the request for waiver of 47 C.F.R. § 73.3555(c) by Flinn Broadcasting Corporation IS GRANTED; having found the applicants fully qualified, the application for assignment of license of KFTH(FM), Marion, Arkansas, from Big Ben Communications, Inc. to Flinn Broadcasting Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[9] Although Flinn contends that there are 48 radio stations, 25 AM stations and 23 FM stations, in the Metro Market, our analysis concludes that the relevant market only includes the 40 radio stations noted above.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HERITAGE-WISCONSIN BROADCASTING CORP. — File Nos. BTC-920305KY, BTCH-920305KZ

For Transfer of Control of Licenses of Stations WEMP(AM)/WMYX-FM Milwaukee, Wisconsin from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation

WIL MUSIC, INC. — File Nos. BTC-920305KV, BTCH-920305LC

For Transfer of Control of Licenses of Stations WRTH(AM)/WIL-FM St. Louis, Missouri from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation

WBBF, INC. — File Nos. BTC-920305KX, BTCH-920305KW

For Transfer of Control of Licenses of Stations WBBF(AM)/WBEE-FM Rochester, New York from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation

WEAR-LTD. — File Nos. BRCT-910930KW, BTC-920305KQ

For Renewal and Transfer of Control of License of Station WEAR-TV Pensacola, Florida from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation

HERITAGE MEDIA SERVICES — File Nos. BTC-920305KI, BTCH-920305KJ

For Transfer of Control of Licenses of Stations KULL(AM)/KRPM-FM Tacoma, Washington from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1995; Released: July 27, 1995

By the Commission:

1. The Commission has under consideration: (1) its decision in *Heritage-Wisconsin Broadcasting Corp.*, 8 FCC Rcd 5607 (1993)(*"Heritage-Wisconsin"*); (2) a petition for reconsideration of that decision filed by the local branches of the NAACP in Milwaukee, Wisconsin; St. Louis, Missouri; Rochester, New York; Pensacola, Florida; and Seattle, Washington (collectively NAACP); (3) an opposition filed by Heritage Media Corporation, licensee of the stations; and (4) the NAACP's reply to the opposition. For the reasons that follow, we deny the petition.

2. In *Heritage-Wisconsin*, we found no evidence that the licensees of Stations WEMP(AM)/WMYX-FM, WRTH(AM)/WIL-FM, WBBF(AM)/WBEE-FM, WEAR-TV, and KULL(AM)/KRPM-FM, had engaged in discrimination. We found that all of the stations, except KULL(AM)/KRPM-FM, maintained EEO programs which generally complied with our EEO Rule. Accordingly, we granted the applications for transfer of control of the licensees of Stations WEMP(AM)/WMYX-FM, WRTH(AM)/WIL-FM, WBBF(AM)/WBEE-FM, and WEAR-TV, and the application for renewal of the license for WEAR-TV. However, we issued an admonition to Stations WBBF(AM)/WBEE-FM and WEAR-TV for failing to contact sources likely to refer qualified minority applicants whenever a vacancy occurred. *Heritage-Wisconsin*, 8 FCC Rcd at 5611. Also, although we granted the application for transfer of control for the licensee of Stations KULL(AM)/KRPM-FM, we found that the Stations recruitment efforts were deficient. Therefore, we issued a $6,250 Notice of Apparent Liability[1] and imposed reporting conditions. *Heritage-Wisconsin*, 8 FCC Rcd at 5613.

3. Reconsideration is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) (*WWIZ*); 47 C.F.R. §1.106(c). Applying this standard, we conclude that reconsideration is not warranted.

[1] Heritage Media Services, licensee of Stations KULL(AM)/KRPM-FM, paid the forfeiture in full.

4. In seeking reconsideration, the NAACP does not allege any facts not previously considered, but argues that we failed to give the NAACP's statistical evidence sufficient consideration and that we failed to investigate sufficiently the NAACP's charges of mass terminations of minorities. However, we fully considered the NAACP's statistical evidence in reaching our decision and determined that it did not provide sufficient grounds to order a hearing. Similarly, our decision was made only after a complete investigation of the stations' EEO records, which resulted in the above mentioned admonitions and Notice of Apparent Liability. Reconsideration will not be granted for the purpose of debating matters on which we have already deliberated and spoken. *See, e.g., Isis Broadcasting Group*, 8 FCC Rcd (Rev. Bd. 1992), *citing WWIZ*.

5. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by the NAACP IS DENIED.

6. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail-- Return Receipt Requested, copies of this Memorandum Opinion and Order to the NAACP and the licensees of Stations WEMP (AM)/WMYX-FM, WRTH (AM)/WIL-FM, WBBF (AM)/WBEE-FM, WEAR-TV, and KULL (AM)/KRPM-FM.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 27, 1995

MODERN TELECOMMUNICATIONS COMPANY AND GTE MIDWEST INC. FILED A PETITION FOR WAIVER OF SECTION 61.41(C)(2) AND THE DEFINITION OF "STUDY AREA" CONTAINED IN THE APPENDIX-GLOSSARY OF PART 36 OF THE COMMISSION'S RULES AAD 95-63

Comment Date: September 15, 1995
Reply Date: September 29, 1995

On April 19, 1995, Modern Telecommunications Company ("Modern") and GTE Midwest Incorporated ("GTE") filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. That definition constitutes a rule that froze all study area boundaries. The requested waivers would allow GTE and Modern to alter the boundaries of their Missouri study areas when transferring three telephone exchanges (having 3,538 access lines) from GTE to Modern. Modern also seeks waiver of Section 61.41(c)(2) of the Commission's price cap rules, 47 C.F.R. § 61.41, to exempt it from the price cap "all or nothing" rule. That waiver would permit Modern to remain under rate-of-return regulation after acquiring the three exchanges that are currently under price cap regulation. The petitioners state that the Missouri Public Service Commission has approved the transaction.

Interested parties may file comments on the petitioners' petition on or before **September 15, 1995,** and reply comments on or before **September 29, 1995,** with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 95-63. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's ex parte rules. See generally, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's ex parte rules. See generally, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 27, 1995

ROCK PORT TELEPHONE COMPANY AND SOUTHWESTERN BELL TEL. COMPANY FILED A PETITION FOR WAIVER OF SECTION 61.41(C)(2) AND THE DEFINITION OF "STUDY AREA" CONTAINED IN THE APPENDIX-GLOSSARY OF PART 36 OF THE COMMISSION'S RULES
AAD 95-92

Comment Date: September 11, 1995
Reply Date: September 25, 1995

On May 31, 1995, Rock Port Telephone Company ("Rock Port") and Southwestern Bell Telephone Company ("SWBT") filed a joint petition for waiver of the definition of "Study Area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. That definition constitutes a rule that froze all study area boundaries. The requested waivers would allow SWBT and Rock Port to alter the boundaries of their Missouri study areas when transferring one telephone exchange (having 70 access lines) from SWBT to Rock Port. Rock Port also seeks waiver of Section 61.41(c)(2) of the Commission's price cap rules, 47 C.F.R. § 61.41, to exempt it from the price cap "All or Nothing" rule. That waiver would permit Rock Port to remain under rate-of-return regulation after acquiring the one exchange that is currently under price cap regulation. The petitioners state that the Missouri Public Service Commission has approved the transaction.

Interested parties may file comments on the petitioners' petition on or before **September 11, 1995,** and reply comments on or before **September 25, 1995,** with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 95-92. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's ex parte rules. See generally, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's ex parte rules. See generally, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CLEARTEL COMMUNICATIONS, INC. File No. I-T-C-95-324

Application for authority to acquire and operate facilities for service to various overseas points.

ERRATUM

Released: July 27, 1995

By the Chief, Telecommunications Division:

1. Paragraph 3 of the Commission's Order, Authorization and Certificate, in the above-captioned proceeding, DA-95-1545, released July 13, 1995, should be corrected to read as follows:

> "IT IS FURTHER ORDERED that neither Cleartel nor any persons or companies directly or indirectly controlling or controlled by Cleartel, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Cleartel or any persons or companies controlling or controlled by Cleartel are parties."

2. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ComSouth Cable International, Inc. Application for a License to Land and Operate a Submarine Fiber Optic Cable between the State of North Carolina U.S.A. and Spain with a spur in Bermuda	File No. SCL-95-001

CABLE LANDING LICENSE

Adopted: July 21, 1995; Released: July 27, 1995

By the Chief, International Bureau

INTRODUCTION

1. ComSouth Cable International ("CSCI") requests a license to land and operate a fiber optic submarine cable between the United States and Spain, with a spur to Bermuda (the "CSCI-1" cable). CSCI proposes a privately owned system in which cable capacity would be sold or leased on a non-common carrier basis. The proposed cable would provide efficient and inexpensive routing between the United States and Europe and would promote competition by creating new options for digital traffic flows between the U.S. and Europe, South America, and the Caribbean.[1] Since CSCI has provided sufficient information to comply with the Cable Landing License Act,[2] we grant the cable landing license.

APPLICATION

2. CSCI is a North Carolina corporation owned by Peter Loftin. Mr. Loftin, and CSCI's officers and directors, are all United States citizens. The U.S. portion of the CSCI-1 cable system, including plant and equipment, will be wholly owned by CSCI. The proposed cable would contain at least two fiber pairs operating at a minimum of 2.5 Gbps per fiber pair. The cable will land at a cable station in Wilmington on the coast of North Carolina. From the North Carolina landing point, the cable will extend underwater to a branching unit that will accommodate a spur to Hamilton on the coast of Bermuda, and continue from the branching unit to Conil, on the coast of Spain. The cable is scheduled for completion in the Spring of 1998.[3]

3. CSCI states that, because its application is for non-common carrier offerings and because there is no public interest reason for the Commission to require the CSCI facilities to be offered on a common carrier basis, the application need not be evaluated pursuant to Title II of the Communications Act of 1934.[4] CSCI urges the Commission to consider the application only pursuant to the Cable Landing License Act.

4. CSCI believes that its proposal will result in significant public benefits. By providing a direct link to Spain from the coast of North Carolina, CSCI submits that it will be possible to provide international service to Europe from the southeast region of the U.S. less expensively than through current terminus points in New Jersey and New England. Moreover, CSCI believes that the existence of CSCI-1 will promote competition by creating new options for digital traffic flows between the United States and Europe, South America and the Caribbean, and provide restoration capability for existing cables connecting the U.S. to Europe.[5] Specifically, CSCI intends to provide, from the landing site in Bermuda, an alternate route to Europe via the PTAT-1 cable system.

COMMENTS

5. We placed the application on public notice on January 31, 1995, and received no comments. Pursuant to Section 1.767(b) of the Commission's Rules,[6] the Cable Landing License Act and Executive Order No. 10530, we informed the Department of State of CSCI's application. The Department of State, after coordinating with the National Telecommunications and Information Administration and the Department of Defense, stated it has no opposition to the grant of the cable landing license.[7]

DISCUSSION

6. CSCI requests a license under the Commission's private submarine cable policy, which it adopted in 1985, to promote competition in the provision of international transmission facilities.[8] Pursuant to this policy, the Commission has found non-common carrier cable authorizations to be proper where there is no legal compulsion to serve the public indifferently and where there are no reasons, implicit in the nature of the operations, to expect an indifferent holding out to the eligible user public.[9]

7. Because of the wide availability of common carrier circuits between the United States and Europe,[10] there is no public interest reason to require that CSCI's proposed

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[1] CSCI Application, at 5.
[2] "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§ 34-39 (1995) ("Cable Landing License Act").
[3] CSCI Application, at 4.
[4] 47 U.S.C. §§ 201-229 (1995).
[5] CSCI Application, at 2.
[6] 47 C.F.R. § 1.767(b) (1994).
[7] Letter from Michael T. N. Fitch, Deputy U.S. Coordinator, Office of International Communications and Information Policy, U.S. Department of State, to Scott Blake Harris, Chief, International Bureau, FCC, June 19, 1995.
[8] *Tel-Optik, Ltd.*, 100 FCC 2d 1033, 1041 (1985) (*Private Cable Decision*).
[9] *Optel Communications, Inc.*, 8 FCC Rcd 2267 (1993) (conditional license); *see National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 922 (1976) (*NARUC I*).
[10] Currently, in the Atlantic Region 11,340 circuits (64-kbps) are available in a private cable and 52,920 circuits (64-kbps) are

cable facilities be provided on a common carrier basis.[11] Also, in light of the most current data,[12] we see no prospect of creating significant overcapacity by the introduction of a non-common carrier facility, so as to threaten the economic viability of existing common carrier cable or satellite facilities.[13] Thus, we find there is no legal compulsion to serve the public indifferently.

8. In addition, since CSCI will make "individualized decisions, whether and on what terms to deal," and does not undertake to "carry for all people indifferently",[14] there is no reason to expect that the proposed CSCI cable circuits would be held out to the public indifferently.[15] We conclude under applicable precedent that CSCI's proposal to sell or lease bulk capacity in the CSCI-1 cable is not likely to be made available to the public as common carriage and therefore need not be regulated under Title II of the Communications Act.[16]

9. CSCI has provided the information required by Section 1.767 of the Commission's rules.[17] Based on the information provided by CSCI, we conclude that the grant of the requested authorization will not have a significant effect on the environment as defined in Section 1.1307 of the Commission's Rules and Regulations implementing the National Environmental Policy Act of 1969.[18] Consequently, no environmental assessment is required to be submitted with this application under Section 1.1311 of the Commission's rules.[19]

10. Accordingly, in view of the above, we conclude that U.S. interests under the Cable Landing License Act will be served by grant of a license to CSCI as conditioned below.

ORDERING CLAUSES

11. Consistent with the foregoing, the Bureau hereby GRANTS AND ISSUES, under the provisions of the Cable Landing License Act and Executive Order 10530, ComSouth Cable International, Inc. a license to land and operate a high-capacity fiber optic digital submarine cable, associated regenerators and supervisory circuits extending between Wilmington, North Carolina, and Conil, Spain, with a spur to Hamilton, Bermuda. This grant is subject to all rules and regulations of the Federal Communications Commission; any treaties or conventions relating to communications to which the United States is or may hereafter become a party; any action by the Commission or the Congress of the United States rescinding, changing, modifying or amending any rights accruing to any person hereunder; and the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon its shore, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensee shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view of protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensee or any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall not acquire or enjoy any right, for the purpose of handling or interchanging traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons controlling it or controlled by it are parties;

(4) Neither this license nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) The Licensee shall maintain no less than a 50 percent ownership interest and voting control share in the proposed cable, including 100 percent ownership in the cable station at Wilmington, North Carolina and in the U.S. land portion of the cable from the station to the U.S. beach joint of the submersible portion of the proposed cable;

(6) The Bureau reserves the right to require the Licensee to file an environmental impact statement should it determine that the landing of the cable at those locations and construction of necessary cable landing stations would have a significant impact upon the environment within the meaning of Sections 1.1305-1.1307 of the Commission's Rules and

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available in common carrier cables. In 1995 and in 1996, common carrier cable circuit capacity is scheduled to increase by an additional 60,480 circuits (64-kbps) in each year. In the American Region, 94,500 circuits (64-kbps) are available in common carrier cables, and an additional 60,480 circuits (64-kbps) are scheduled to be available late 1995 in a private cable. *Streamlining the International Section 214 Authorization Process and Tariff Requirements, Notice of Proposed Rulemaking*, FCC 95-286, p.11, n.30 (Adopted July 13, 1995).

[11] *See Optel Communications, Inc.*, 8 FCC Rcd, at 2268. d

[12] *See supra* note 11.

[13] *See Optel Communications, Inc.*, 8 FCC Rcd, at 2268-69.

[14] *NARUC I*, 525 FCC 2d, at 641.

[15] *See NARUC I*, 525 F.2d 630; *see also, Pacific Telecom Cable, Inc.*, 2 FCC Rcd 2686 (1987) (conditional license); 4 FCC Rcd 8061 (1989) (final license); *Transnational Telecom Ltd.*, 5 FCC Rcd 598 (1990); *Transgulf Communications Ltd., Inc.*, 6 FCC Rcd 2335 (1991).

[16] *NARUC I*, 525 F.2d 630; *Private Cable Decision*, 100 FCC 2d 1033, 1046.

[17] 47 C.F.R. § 1.767 (1994).

[18] 42 U.S.C. §§ 4321-4335 (1976).

[19] 47 C.F.R. § 1.1311 (1994).

Regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321-4335; this license is subject to modification by the Commission upon its review of any environmental impact statement that it may require pursuant to its Rules;

(7) The Licensee shall, by application, obtain Commission approval prior to the sale or transfer to a foreign entity of five percent or more in the aggregate of U.S.-owned and controlled ComSouth stock;

(8) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. Sections 34-39, or for failure to comply with the terms of the authorization;

(9) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service, and this license shall expire 25 years from such date, unless renewed or extended upon proper application, and upon expiration of the license, all rights granted under it shall be terminated; and

(10) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this cable landing license.

12. This order is issued under Section 0.261 of the Commission's Rules, 47 C.F.R. 0.261, and is effective upon release. Petitions for reconsideration under Section 1.106, or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. 1.106, 1.115, may be filed within 30 days of the date of public notice of this order (See 47 C.F.R 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris,
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WGPR, Inc. BALCT-941027KI
(Assignor)

and

CBS, Inc.
(Assignee)

For Assignment of License of
WGPR-TV, Detroit, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 1995; Released: July 27, 1995

By the Commission:

1. The Commission has before it the application for assignment of license of WGPR-TV, Channel 62 (Ind.), Detroit, Michigan, from WGPR, Inc. (Seller) to CBS, Inc. (CBS). Because CBS is the licensee of radio stations WWJ(AM) and WYST(FM), both in Detroit, CBS seeks a waiver of Section 73.3555(c) of the Commission's Rules, the one-to-a-market rule. Petitions to deny the application were filed by Spectrum Detroit (Spectrum) and Alexander J. Serafyn. CBS and Seller each filed consolidated oppositions, and Spectrum and Serafyn filed replies. Commission staff sent a February 13, 1995 letter of inquiry to the applicants, to which both Seller and CBS separately responded and Spectrum and Serafyn separately commented.[1]

2. Spectrum, a Michigan corporation owned by seven African-American individuals who reside in the WGPR-TV service area, urges the Commission to deny the application or designate it for hearing on the grounds that CBS allegedly assumed premature control of WGPR-TV through the local marketing agreement it entered into with the Seller concurrently with the execution of the Asset Purchase Agreement for the station. Additionally, Spectrum asserts that the application should be designated for hearing to determine whether the public interest is served "by the loss" of minority-owned WGPR-TV to CBS.

3. Serafyn, a Troy, Michigan resident and viewer of WGPR-TV, argues that the Commission should deny the application and associated waiver request because, he asserts, CBS will not broadcast on WGPR-TV programs that are in the public interest, as demonstrated by the allegedly distorted news reports and anti-Ukrainian statements contained in a CBS "60 Minutes" segment aired last fall entitled "The Ugly Face of Freedom." At the very least, Serafyn asserts, the Commission should defer action on the CBS application for WGPR-TV until resolution of a personal attack complaint filed by the president of the Ukrainian Congress Committee against CBS based upon that "60 Minutes" episode.[2]

ALLEGED PREMATURE ASSUMPTION OF CONTROL

Background

4. The application before us, according to CBS, "grows out of CBS's efforts to ensure the continued availability of its network programming on over-the-air-television to the Detroit public." On May 27, 1994, CBS notes, its former affiliate in Detroit, WJBK(TV), Channel 2, notified CBS that it would be terminating their affiliation agreement as of November 27, 1994.[3] In the meantime, CBS sought a replacement affiliate in Detroit, but concluded "that its best alternative for securing an outlet in the Detroit market was to acquire WGPR-TV." After approximately four weeks of negotiations with Seller, CBS states, Seller and CBS, on September 23, 1994, executed the Asset Purchase Agreement now before us. The parties concurrently executed a local marketing agreement, because, asserts CBS, "there was no assurance that FCC approval of the acquisition could be obtained prior to the termination date of CBS's affiliation agreement" with its Detroit affiliate WJBK(TV).

5. The local marketing agreement, effective no later than November 27, 1994, is slated to continue for a period of 24 months unless consummation of the WGPR-TV acquisition occurs before that time.[4] *See* LMA at Sections 1, 11.5. Under the agreement, CBS purchases from Seller all airtime, except for one hour per week, from 7:00 to 8:00 a.m. on Saturdays, *see id.* at Section 2, for an annual payment of one million dollars and reimbursement of certain budgeted amounts for station operations. *See id.* at Sections 4.1, 4.2, 12.2, Appendix A.[5] CBS, however, is entitled to sell all commercial advertising for its own account and may collect all revenues emanating from such sales. *Id.* at Section 9.2. *See id.* at Section 14. Seller, however, is to oversee and take ultimate responsibility with respect to the provision of equal opportunities, lowest unit

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[1] Subsequent to this latter round of pleadings, CBS, on March 8, 1995, submitted a response to issues raised in the petitioners' responsive pleadings. Serafyn responded to CBS's March 8, 1995 filing and Serafyn requested that we disregard matters addressed by CBS which "do not reasonably or fairly flow" from Spectrum's response.

[2] The Commission has ruled on the complaint, finding that the rule was not violated and that further action is not warranted. *See* Letter to Askold S. Lozynaskj from Milton O. Gross, Chief, Political Programming Branch, dated February 8, 1995, *review denied Ukrainian Congress Committee of America*, FCC 95-279 (released July 19, 1995).

[3] CBS negotiated an extension with the affiliate through December 10, 1994.

[4] CBS may extend the agreement for an additional 24-month period by notifying Seller in writing. *See* LMA at Section 1.

[5] According to Appendix A of the agreement, Seller is to submit to CBS a budget setting forth monthly expenses and operating income anticipated to be incurred or earned in operating WGPR-TV through December 1995. CBS will pay Seller on a monthly basis an amount equal to the amount by which the budgeted expenses for such month exceeds the budgeted amount of operating income to be received by Seller.

charge, and reasonable access to political candidates, and compliance with the political broadcasting provisions of the FCC requirements. *See* LMA at Section 9.3.

6. The programming format, as indicated by the agreement, is to consist of both CBS Television Network material as well as certain of the station's existing programs which are to be made available to CBS. *See id.* at Sections 2, 6. Seller, under Section 7, acknowledges its familiarity with CBS's programming and has determined that the broadcast of such programming on the Station would serve the public interest and is otherwise suitable. As for programming that is responsive to community needs and those of children, CBS agrees that it will "cooperate" with Seller to provide such material. *See id.* at Section 7. It is Seller, pursuant to Section 3(e), who is responsible for ascertaining community problems, needs and interests, broadcasting programming responsive to them, and timely preparing and placing in the station public inspection file appropriate documentation thereof. Notwithstanding CBS's right to program, Seller, as provided in Section 5.1, retains the right to: reject or refuse programs that it "believes in good faith" to be unsuitable or contrary to the public interest; substitute a program it "believes in good faith" to be of greater local or national importance or which is designed to address the problems, needs and interests of Detroit; preempt any program in the event of a local, state or national emergency; refuse to broadcast any program that does not meet Commission requirements; or delete any commercial announcement that does not comply with Commission requirements or other state, local or federal laws. Seller's preemption or substitution of any of broker's programming that complies with FCC requirements, however, will reduce the annual payments to Seller on a *pro rata* basis. *See id.*

7. Beyond the programming aspect of the brokering arrangement, the local marketing agreement provides, in Section 5.1, that "as long as [Seller] remains the licensee of the Station, [Seller] will have full authority, power and control over the operation of the Station and over all persons employed by it." As for personnel, Seller is obligated, under Sections 3(a) and (b), to employ at minimum a general manager and another full-time employee to assist the GM, neither of whom may have an employment, consulting, or other material relationship with CBS. However, according to Section 5.4, Seller is to make available to CBS during the term of the agreement the full-time services of WGPR-TV sales, traffic and collections employees, who will not have "an employee/employer relationship" with CBS. With respect to other operations of the station, Seller must maintain a main studio at which the general manager and other full-time employees of the station will be available during business hours. Section 4.5 of the Asset Purchase Agreement between Seller and CBS states that during the term of the local marketing agreement, CBS "shall have no authority and shall not seek to cause the termination of any [WGPR-TV] employee." We assume, therefore, that Seller will employ more than the local market agreement's minimum required complement of two full-time employees. Maintaining station logs and political and public inspection files is also the duty of Seller. *See* LMA at Section 3(f). With respect to other operations of the station, the agreement provides, in Section 3(c), that Seller retains "ultimate control over the personnel, finances, programming and operation of the Station." *See also id.* at Section 5.1 (Seller "will have full authority, power and control over the operation of the Station and over all persons employed by it.")

8. Finally, although the local marketing agreement is set to terminate upon CBS's acquisition of WGPR-TV, in the event of a default by one party, the agreement may be terminated by the non-defaulting party, who may pursue all remedies available at law or in equity. *See* LMA at Section 11.4.[6] Either party may assign its rights under the agreement with the prior written consent of the other, and CBS may do so to a third party "qualified under the FCC Requirements" without such consent of Seller.

Legal standard

9. Section 310(d) of the Communications Act prohibits the transfer of control of a station license, or any rights thereunder, without prior Commission consent. In determining whether an unauthorized transfer of control has occurred, the Commission looks to any acts or agreements vesting in a "new" entity the right to determine basic policies concerning the operation of the station. *E.g., WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841, *cert. denied*, 403 U.S. 923 (1971). The focus of any Commission inquiry with respect to locus of control of a station's operation is tripartite: the programming, the personnel and the finances. *E.g., Stereo Broadcasters, Inc.*, 55 FCC 2d 87 (1981), *reconsideration denied*, 50 R.R. 2d 1346 (1982). Relying on this standard, Spectrum maintains that CBS has assumed control of WGPR-TV through the local marketing agreement it entered into with Seller.

10. We note that a licensee's participation in a local marketing agreement, also known as a time brokerage agreement, is not *per se* violative of the Act or of any Commission rule or policy. Under a local marketing agreement, first utilized by broadcasters at least half a century ago, *see Metropolitan Broadcasting Corporation*, 8 FCC 557 (1941), and first expressly endorsed by the Commission in *Part-time Programming*, 82 FCC 2d 107 (1980), a licensee offers its airtime to a third-party in exchange for programming and compensation. In return, the third-party programmer supplies programming and sells commercial announcements to support its bloc of programming.

11. The treatment of these agreements in the television context is currently the subject of a rule making proceeding. *Review of the Commission's Regulations Governing Television Broadcasting* in MM Docket No. 91-221, FCC 94-322, released January 17, 1995. In a supplement to its petition, Serafyn argues that we should apply to the Seller-CBS arrangement the standard recently enunciated by the Mass Media Bureau. *See Public Notice* (No. 54161, released June 1, 1995). There, the Bureau limited the number of allowable relationships between the parties to an LMA set to commence or to continue following the proposed assignment or transfer. To the extent that that standard may apply here, we decline to follow it for lack of notice to the parties and because the LMA before us is set to terminate by its terms upon consummation of the transaction pro-

[6] A default is defined in Sections 11.1 and 11.2 as the failure of either party to observe or perform any material covenant or violation of any material representation or warranty.

posed. However, we will apply the standards to other cases where the LMA either has been executed after the release of the *Public Notice* or is scheduled to continue under the ownership of the proposed assignee. For cases like the one before us, therefore, we shall abide by past Commission and staff pronouncements on the matter of local marketing and time brokerage agreements. *E.g., Gisela Huberman, Esquire*, 6 FCC Rcd 5397 (MMB 1991); *J. Dominic Monohan, Esquire*, 6 FCC Rcd 1867 (MMB 1991); *Peter D. O Connell, Esquire*, 6 FCC Rcd 1869 (MMB 1991); *Brian M. Madden, Esquire*, 6 FCC Rcd 1871 (MMB 1991); *Roy R. Russo, Esquire*, 5 FCC Rcd 7586 (MMB 1990); *Joseph A. Belisle, Esquire*, 5 FCC Rcd 7585 (MMB 1990).[7] Those cases hold that the three-part standard against which we assess control applies with equal force to a licensee that is party to a local marketing agreement. Thus, a licensee involved in a local marketing relationship is not relieved of its overarching duty to retain ultimate control, that is, to mandate basic policies pertaining to the fundamental station operations of programming, personnel and finances. *E.g., Cosmopolitan Broadcasting Corporation*, 59 FCC 2d 558, *recon. denied*, 61 FCC 2d 257 (1976); *Roy R. Russo, Esquire*, 5 FCC Rcd at 7587. But as is true with any broadcaster, even one whose station is brokered, a licensee is permitted under Section 310(d) to delegate day-to-day operations relating to those three areas, so long as the licensee continues to set the policies guiding those operations. *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981); *The Alabama Educational Television Commission*, 33 FCC 2d 495, 508 (1972). The touchstone of control, in short, is not divining who executes the station's programming, personnel and finance responsibilities, but who establishes policies governing the three areas and exercises ultimate control. Here, Spectrum alleges that CBS controls each of those three facets of WGPR-TV's operations. We find, as discussed below, that Spectrum has erroneously interpreted Seller's delegation of WGPR-TV operations as an abdication of ultimate decision-making authority over those responsibilities.

Allegations of CBS control over WGPR-TV programming

12. With respect to the first criterion, Spectrum argues that not only has the WGPR-TV format changed under the local marketing agreement, from independent television programming to CBS network programming, but long-time local programs, primarily ministry programs produced by local churches, have been eliminated, abbreviated, or moved to less desirable time slots. These programming changes, Spectrum contends, were all dictated by CBS.

13. We find that the WGPR-TV format change from independent programming to network programming indicates nothing more than implementation of Seller's ultimate decision to broadcast CBS's fare. In so doing, Seller has not ceded its control. Indeed, like a broadcaster operating pursuant to a network affiliation agreement, Seller here, under the terms of its local marketing agreement with CBS, expressly holds ultimate control of WGPR-TV programming. Section 5 of that agreement assures that Seller has the unqualified right to: substitute a program it believes is of greater local or national importance or which it believes will better address the problems, needs and interests of Detroit; reject or refuse a program that it believes is unsuitable or contrary to the public interest; refuse to broadcast any program that does not meet Commission requirements; preempt any program in the event of a local, state or national emergency; and delete any commercial announcement that does not comply with Commission requirements or any other laws.

14. In an attempt to demonstrate that the parties' actual practices diverge from the written agreement, Spectrum proffers three letters sent by Seller to local program producers that had aired their programming on WGPR-TV prior to execution of the Seller-CBS local marketing agreement. In the first letter, dated September 30, 1994, Seller informed local programmers of possible cancellation of their shows and indicated that "CBS, Inc. may decide to exercise [a cancellation] clause once they begin programming the station." In the November 16, 1994 letter, Seller set forth the proposed WGPR-TV schedule for the local religious programming to be retained and stated that "in a meeting with local ministers, Jonathan Rodgers, President of CBS Owned and Operated Stations dedicated the above airtime to religious programming from December 1994 until the Fall of 1995 television season." And in the December 2, 1994 letter, Seller congratulated those programmers which were to remain with the "WGPR-CBS 62 broadcast line-up" and noted that the party's "first broadcast with CBS" was to be the following week.

15. Rather than establish CBS's assumption of control, as Spectrum alleges, we find that the letters merely demonstrate threshold programming decisions rendered by CBS in programming the station, clearly the proper domain of the broker in a local marketing arrangement. *See Roy R. Russo, Esquire*, 5 FCC Rcd 7586, 7587 (1990). Nowhere do the letters confirm Spectrum's allegation that Seller has not been, or will not be, the ultimate policymaker vis-a-vis programming. Indeed, the first letter was signed by Seller's president and the latter two were signed by Seller's program director, Joe Spencer, who apparently has worked in that capacity at WGPR-TV since at least 1992. Moreover, the December 2 letter from Spencer closes by informing the local producers for WGPR-TV that

> If you have any problems or concerns in meeting the above requests [regarding the technical aspects of delivering programming to WGPR-TV] please contact my office immediately. In maintaining your on-going relationship with CBS 62 my office will also be your contact. So, if you have any problems or good news please bring it to my attention.

Seller's letters to local programmers appear to represent Seller's ratification of CBS's programming plans, as well as to evidence Seller's intention to retain the long-time station program director in a supervisory capacity. Either interpretation indicates Seller's ultimate control. Facts such as these that support more than one plausible conclusion are not considered "specific" within the meaning of Section

[7] Notwithstanding Spectrum's intimations to the contrary, the standard for determining the locus of control of a broadcast station operated pursuant to an LMA is the same for both radio and television stations. The sole distinction between the two services vis-a-vis the use of LMAs is their treatment under the Commission's attribution rules. A licensee's time brokerage of any other radio station in the same market for more than 15% of the brokered station's weekly broadcast hours would result in counting the brokered station toward the brokering licensee's national and local ownership limits. 47 C.F.R. §73.3555(a)(2)(i).

309(d) and, consequently, fail to meet statutory pleading standards. *See Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992); *Arnold L. Chase*, 5 FCC Rcd 1642, 1645 (1990). The evidence thus substantiates and we find that Seller has maintained ultimate control of WGPR-TV programming, as provided under the terms of its local marketing agreement and in practice.

Allegations of CBS control over WGPR-TV personnel

16. As for personnel, Spectrum assails CBS's use of one of its executives, Jay Newman, who, Spectrum notes, was quoted in a *Detroit Free Press* article as saying, "I'll be working full-time in Detroit." The article, Spectrum adds, also stated that Newman was "named to run WGPR-TV, Channel 62." A CBS executive, Spectrum suggests, is more likely to consult with CBS headquarters in New York City than with Seller's designated general manager at the station. Moreover, Spectrum contends that although the local marketing agreement requires Seller to retain a general manager and another full-time employee and to "loan" its sales, traffic and collection staff to CBS in implementing the local marketing agreement, CBS fails to provide specific information regarding the "number and nature" of the Seller's employees slated to be on loan or those to be brought in by CBS. Spectrum maintains that CBS will run the station, whether by using its own employees or those of Seller.

17. We have acknowledged that a local marketing arrangement, which entails the broker's provision of programming and the sale of advertising to be aired on the station, by its very nature necessitates the presence of the broker's staff at the licensee's studio. *See, e.g., Gisela Huberman, Esquire*, 6 FCC Rcd at 5397(broker to employ and be responsible for the salaries, commissions, taxes, insurance and all other related costs for all personnel involved in the production and broadcast of its programming on the brokered station). That CBS executive Jay Newman will superintend CBS's rights and obligations under the local marketing agreement from Detroit and may, as Spectrum surmises, seek direction from his superiors at CBS on those matters, does not, therefore, in and of itself demonstrate CBS's control over station operations. The Commission's focus, as with the programming component, is on the locus of ultimate control. Here, under Section 3 of its local marketing agreement with CBS, Seller is the contractual holder of ultimate control over personnel and the operations of WGPR-TV. Spectrum's speculation that CBS's Newman will, in practice, usurp Seller's ultimate control is supported only by a *Detroit Free Press* feature story in which the reporter writes that Newman was "named to run WGPR-TV, Channel 62." Not only does the Commission refrain from taking official notice of news accounts, *News International, PLC*, 97 FCC 2d 349, 358 (1984), but the reporter's statement lends itself to more than one conclusion, one being that Newman will "run" WGPR-TV pursuant to the Seller-CBS local marketing agreement. Thus, while Spectrum is correct to rely on the Commission's standard in *WHDH, Inc.*, 17 FCC 2d 856, 863 (1969), that control includes any act which vests in a new entity the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue, CBS's act of placing one of its executives at WGPR-TV to execute the local marketing agreement does not vest in CBS the right to operate the station or to mandate station policy.

18. Spectrum's challenge to Seller's employment structure at WGPR-TV is also without merit. Seller is obligated under Section 3 of its local marketing agreement with CBS to employ a general manager who "will report" to Seller and who will have no "employment, consulting, or other material relationship" to CBS, as well as a full-time employee to assist that general manager. As is true for any other broadcaster, Seller must maintain a "meaningful management and staff presence" at its main studio, as required by *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024 (1988). The presence of a general manager and a full-time assistant satisfies the minimum staffing requirements. *Jones Eastern of the Outer Banks, Inc. (Clarification)*, 7 FCC Rcd 6800 (1992).[8] Whatever the number and nature of any other employees retained by Seller or brought in by CBS, there is no evidence that the CBS employees have displaced the licensee and its general manager in ultimate decision-making functions.

19. We note, however, that in addition to the requisite personnel, Seller, during the term of the local marketing agreement, will retain a complement of employees, over whom CBS holds no termination authority and for whom Seller is contractually responsible for compensation. *See* Section 4.5 of Seller-CBS Asset Purchase Agreement. Although, pursuant to Section 5.4 of the local marketing agreement, Seller will make available to CBS its employees engaged in sales, traffic and collections functions, CBS will have no employee-employer relationship with these personnel nor be liable for their compensation. *Id.* A brokered station's sharing of its staff with the broker is permissible. *Michael R. Birdsill*, 7 FCC Rcd 7891 (Complaints & Investigations Br., Enforcement Div., MMB 1992). Accordingly, Spectrum has failed to demonstrate that CBS's interaction with Seller's employees is inconsistent with Commission rules and policies.

Allegations of CBS control over WGPR-TV finances

20. In its petition, Spectrum, again relying on news interviews with CBS's Jay Newman featured in the November 17, 1994 editions of two Detroit daily newspapers, points to alleged CBS expenditures of five million dollars for WGPR-TV facilities improvements and an additional one million dollars for a promotional campaign for the station. Spectrum concludes that these funds, combined with the one million dollar annual payments under the local marketing agreement, evidence a premature transfer of control vis-a-vis station finances.

21. On February 13, 1995, the staff requested via letter to CBS clarification of improvements to the WGPR-TV facility funded by CBS. In response, CBS acknowledges that it has made or will make capital expenditures in connection with its local marketing arrangement, but in an amount totalling approximately $2.3 million, not five million dollars as initially estimated by Newman.[9] Newman's

[8] Contrary to Spectrum's contention, the manager-plus-assistant staffing requirements pertain to television station studios as well as to radio station studios. These staffing requirements, therefore, apply equally to both television and radio stations operating under a local marketing agreement.

[9] Not included in the $2.37 million figure is the approximately $372,000 expended by CBS on its own Stroh River Place facility, a building separate from the WGPR-TV studio which serves as

estimate, according to CBS, included fees to be advanced to Seller under the local marketing agreement. The expenditures can be classified into two groups: (1) those for the purchase of equipment to be loaned to Seller, totalling $1.7 million; and, (2) those for improvements to Seller's real property and transmission facilities, to be permanent fixtures not reimbursable to CBS, totalling $605,000.

22. The $1.7 million of equipment to be loaned to Seller was necessary, according to CBS, for the station's receipt and broadcast of a large volume of both network and syndicated programming. These accoutrements, which CBS purchased and whose installation CBS arranged "with my approval," asserts Seller president and general manager George Mathews, were not needed by Seller prior to execution of the local marketing agreement, because Seller's programming was largely locally supplied. Existing broadcast equipment at WGPR-TV, notes Robert Seidel, CBS vice president of CBS Television engineering, was "clearly inadequate to the operation of a network affiliated station." Additionally, CBS purchased a new stand-by transmitter, capable of generating 40,000 watts, for use by the station during thex term of the local marketing agreement.[10] CBS asserts that reliance upon WGPR-TV's existing back-up transmitter, capable of generating only 1,000 watts, would have meant a loss of service to two-thirds of the station's TV's Grade A coverage area in the event of a malfunction in the main transmitter.[11] Installation of the back-up transmitter was undertaken by a firm recommended to CBS by WGPR-TV's chief engineer, Albert Ruedemann, who states in a declaration that he also supervised the installation.

23. An October 31, 1994 written agreement between CBS and Seller (the Equipment Loan Agreement), a copy of which accompanied CBS's response to the staff letter, expressly provides that all of the equipment in this first category of expenditures "(1) is for all purposes the property of CBS and (2) will remain the property of, and be returned to, CBS if, for any reason, the acquisition of the Station by CBS is not consummated as contemplated by the Purchase Agreement." In the meantime, Seller's older equipment, according to WGPR-TV's chief engineer Ruedemann, is in storage in the station's transmitter building and could "easily be reinstalled" if CBS does not acquire WGPR-TV.

24. The second category of expenditures, totalling approximately $605,000, includes $165,660 of improvements to "a very small part" of the station's studio, all of which were "approved in advance" by Seller's chief engineer Ruedemann, according to Seller's president Mathews. The improvements are to accommodate the new broadcast equipment, including installation of supplementary air conditioning to adequately cool the equipment, installation of a security system to safeguard it, redistribution of electrical service for the increased electrical load created by it, and removal of a wall to make space for it. The $605,000 amount also comprises $439,000 that CBS is expending for the repair and maintenance of, as well as improvements to, the WGPR-TV transmission facilities, including: the purchase of Klystron tubes, which are vital to the functioning of the transmitter; de-icers and slot covers for the main antenna, which are essential in operating the antenna in cold weather; and upgrades to the studio-to-transmitter link (STL). Seller president Mathews states that he agreed to the maintenance work on the transmission system, but that "it was my express direction that the project be carried out under the supervision of Al Ruedemann." Ruedemann, who has served as chief engineer of WGPR-TV since April 1988, states in his declaration that he and his assistant John Azar together or separately were, in fact, responsible for informing CBS of the specific needs of the station, for recommending the contractors who would perform the work, and for supervising all work that was done on the transmission facilities. Under a separate October 31, 1994 agreement (Facilities Improvement Agreement), CBS and Seller agreed that the $605,000 of improvements integrated into WGPR-TV's real property and transmission system would convey to CBS upon consummation of the Asset Purchase Agreement or would remain the Seller's property in the event there is no consummation. In either event, Seller and CBS note, there will be no reduction in the consideration to be paid to Seller under the Asset Purchase Agreement and no reimbursement to CBS for those expenditures.

25. CBS's financing of capital improvements to WGPR-TV's physical facilities is "not unusual," according to the declaration of CBS president of affiliate relations Anthony Malara, who states that over the years the network has either fully or partially reimbursed affiliates for several major capital equipment items. Malara points to several examples: CBS's full reimbursement to all interconnected affiliates of primary and backup earth stations at the time it inaugurated satellite distribution several years ago; CBS's partial reimbursement of approximately $150,000 to each of 55 affiliates toward the cost of a satellite newsgathering truck, as well as full reimbursement to those same stations of approximately $60,000 each for an electronic communications package enabling the newsgathering truck to communicate with CBS News and other affiliates while on the road; and CBS's partial reimbursement of approximately $50,000 to each of more than 50 stations toward the cost of a fixed Ku-uplink. CBS, according to Malara, has also provided block grants to affiliates for the purchase of capital equipment, as it did for its affiliate in West Palm Beach, Florida, and will be providing satellite earth station equipment to nearly 20 new CBS affiliates at a cost of $200,000 or more per station. The amount of funds advanced in this case, $605,000, is greater than that ever provided to an affiliate, because, states Malara, "the technical problems faced by WGPR-TV as of early November 1994 were incomparably greater than we had ever pre-

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the "headquarters" for CBS operations under the local marketing agreement. The improvements there include television sets for off-air viewing of WGPR-TV by station personnel, computers for management of commercial sales, expanded telephone system, desks and sundry office furniture for staff and miscellaneous refurbishment of wall coverings and carpet. *See* Attachment A of CBS's February 16, 1995 response to staff letter. These improvements, made to facilities other than those owned by Seller, are not persuasive as to control of the station.

[10] The cost of the stand-by transmitter, according to CBS's Seidel, was $319,000. That figure, when combined with the $1.38 million expended or to be expended on the other loaned equipment mentioned above, totals $1.7 million.

[11] According to WGPR-TV's chief engineer Albert Ruedemann, the station's main transmitter did malfunction on February 3, 1995. "Had it not been for the new back-up transmitter provided by CBS," Ruedemann states in his declaration, "hundreds of thousands of metro Detroit viewers would have been unable to receive the Station's signal for more than seventeen hours."

viously encountered with respect to any CBS affiliate." The amount of money committed by CBS to assist the station, Malara asserts, "was therefore significant."

26. In sum, according to the applicants, the equipment and improvements expenditures are not indicative of an assumption of control by CBS over the station's finances. A time broker's decision to provide financial support for improvements in the technical facilities of a brokered station, CBS contends, is no less legitimate or more indicative of an assumption of control than the decision by a network to provide such support to its affiliate. Further, notes Seller president Mathews, Seller's accounts have not been commingled with those of CBS and Seller remains responsible for the salaries of its own employees, rental payments under the tower lease, utility bills, insurance premiums, music rights fees and program license fees.[12]

27. At the outset, we distinguish the situation before us from those in cases cited by Spectrum as precedent for ascertaining control via finances. In *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *WLOX Broadcasting Company v. FCC*, 260 F.2d 712 (D.C. Cir. 1958), and *Heitmyer v. FCC*, 95 F.2d 91 (D.C. Cir. 1937), the purportedly controlling status of the licensee or permittee was in question because a third party had supplied all of the funds for acquisition or construction of the broadcast station and had attempted to exercise a level of control corresponding with that financial contribution. Those are not the circumstances here, where Seller has owned and operated WGPR-TV since 1975, free of any relationship with CBS. Although CBS has entered into a purchase agreement and a local marketing agreement with Seller, those contracts represent arm's-length transactions. Seller is an established broadcaster, which is not dependent upon CBS for the acquisition or construction of its station, and CBS is an established network, which is admittedly desirous of purchasing Seller's longheld station as an outlet for its programming in Detroit. Moreover, there is no evidence that CBS has attempted to insinuate itself into Seller's corporate governance or finances. Thus, we find no precedential value in Spectrum's cited cases.

28. In addressing Spectrum's allegation of CBS control, we shall, as Spectrum argues we should, view the cumulative effect of the CBS funds flowing to Seller to evaluate the allegation that CBS controls Seller's finances. It is true that CBS's annual brokerage payment of $1 million to Seller under the Seller-CBS local marketing agreement and its reimbursement to Seller of other expenses on a monthly basis constitute the sole source of funding of Seller's broadcast operations for the term of the brokering arrangement. But payment of those monies is a contractual obligation of CBS under the local marketing agreement, identical to those payable under other local marketing agreements we have approved. *See Roy Russo, Esquire*, 5 FCC Rcd at 7587, *citing United Broadcasting of New York, Inc.*, 4 RR 2d 167, 173 (1965)(What the petitioner characterizes as the broker's "'control of, and responsibility for finances and profits/losses' merely describes the financial arrangement characteristic of time brokerage arrangements -- a profit of advertising revenues over brokerage fee."). A local marketing agreement is a contractual arrangement whereby the licensee makes its airtime available to the time broker in exchange for an amount calculated to incorporate the station's fixed and operating costs plus a built- in profit.[13] So long as the time brokerage agreement governing the arrangement is one which retains the ultimate decision-making authority in the licensee, the receipt of such monies does not amount to the licensee's abdication of its control over finances.

29. Here, Seller agreed to accept $1 million per year in brokerage fees plus quarterly payments linked to its monthly budgets as consideration for the airtime it makes available to CBS. Given our affirmation of the appropriateness of the other terms of the Seller-CBS local marketing agreement, as discussed above, we find the CBS payments to be an acceptable financial arrangement. We caution licensees engaged in time brokerage arrangements, however, that they must operate, as has Seller, as a stand-alone entity, discrete from the broker. Thus, we require that licensees must maintain their own bank accounts, pay the salaries of their own employees, and remain responsible for their own obligations to programmers, utility companies, and other operational matters. In other words, the licensee should be ready and able to operate independently from the broker at anytime it believes the arrangement does not fulfill its public interest responsibilities.

30. We also view the $2.3 million in equipment and improvements contractually agreed to by both CBS and Seller as a valid extension of the time brokerage arrangement and not, as Spectrum suggests, a contribution to working capital of the station, payments deemed by the Commission in *Phoenix Broadcasting Co.*, 44 FCC 2d 838 (1973), to be inappropriate.[14] Of the CBS funding, $1.7 million is composed of equipment to be loaned to Seller and to be returned to CBS in the event the WGPR-TV sale

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[12] CBS states in its February 22, 1995 response to the staff letter of inquiry that at the request of one program supplier, CBS has agreed to make payments of current license fees directly to the supplier for programs CBS desires to broadcast. CBS has also agreed to pay to this program supplier, upon consummation of the transaction before us, the amount of any pre-LMA license fees then owed by Seller to that supplier. This latter agreement, CBS noted, "is expressly subject to [Seller]'s execution of an amendment to the Purchase Agreement reducing the purchase price by a commensurate amount. On May 1, 1995, CBS filed the modification to the Asset Purchase Agreement, as well as an assignment agreement between CBS and Seller for the assumption of Seller's obligations to the program supplier. Serafyn argues that CBS "concealed" material information from Commission staff in that CBS was loaning money to Seller, a further indication of CBS's control of the station. Serafyn's allegations, based on an incorrect reading of the documents voluntarily furnished by CBS to the Commission, lack merit. The assignment agreement, as CBS earlier indicated, allows CBS to make direct payments to the supplier for current programming and requires Seller to make monthly payments to that supplier for all of its overdue payments. CBS will assume Seller's remaining payments upon closing, and those amounts will be deducted from the purchase price owed to Seller.

[13] Indeed, in sanctioning the concept of time brokerage fifteen years ago, the Commission expressly acknowledged this scenario, noting that contractual arrangements between licensees and brokers "usually involve the broker as both program producer and commercial salesman for a time block purchased from the licensee. . . ." *Part-Time Programming*, 82 FCC 2d at 111.

[14] In *Phoenix Broadcasting*, the proposed 50% purchasers of an AM radio station in Phoenix, Arizona, also proposed, among other things, to advance $30,000 to the licensee in for "working capital and other current debts." 44 FCC 2d at 838.

is not consummated. The balance, $605,000 of improvements to Seller's equipment and real property, will consist of fixtures to be installed in the WGPR-TV facility. They will remain part of that facility, without cost to Seller, regardless of whether CBS acquires the station. Spectrum asserts CBS's initiation of these changes, and Seller's acquiescence thereto, evidence CBS's control of the finances of the station. We are not persuaded as to how CBS's enunciated need for and Seller's approval of the use of certain equipment and improvements for the term of the local marketing agreement enables it to usurp the ultimate financial control held by Seller. Rather than evidence an intent to control the financial aspect of the station, the Equipment Loan Agreement and the Facilities Improvement Agreement demonstrate Seller's ability to exercise its authority as lessor and to protect its interests in its property so that it may operate WGPR-TV on its own, in the event of a breach or termination of the local marketing agreement.[15]

Participation in local marketing agreement pending Commission action

31. Finally, a local marketing agreement, Spectrum posits, "cannot survive the test of Section 310" when it is employed as an interim measure pending the Commission's approval of a related assignment application. Section 310 of the Act provides, in pertinent part, that no station license or rights thereunder "shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly" to any person except upon application to and grant by the Commission.

32. A local marketing arrangement whose term spans the pendency of an assignment application can, as we conclude here, comport with our tripartite, fact-based test for control within the meaning of Section 310(d) of the Act. Assessing whether the licensee holds *de facto*, as well as *de jure*, control of its station is predicated upon the same analysis, whether the period in question occurs during the executory phase of a sales agreement, to which the broker is the proposed assignee of the station, or during some other period of a given license term. *See Joseph F. Bryant*, 6 FCC Rcd 6121 (Video Services Division, MMB 1991)(time brokerage agreement between licensee and program production company controlled by proposed assignee does not constitute premature assumption of control). Notwithstanding *Phoenix Broadcasting Co.*, 44 FCC 2d 838 (1973), and *Fine Arts Broadcasting, Inc.*, 57 FCC 2d 108 (1975), we believe that a licensee operating within the confines of an LMA comporting with Commission policies and rules, as we have determined is the case here, is not prohibited by the pendency of an assignment application.

CONTINUED MINORITY OWNERSHIP OF WGPR-TV

33. CBS's "takeover" of WGPR-TV, Spectrum argues, exacerbates the under-representation of minority viewpoints, a Commission objective espoused in *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978). Spectrum maintains that the 19-year minority ownership of WGPR-TV should not be eliminated "with the sweep of a pen on a sale agreement containing an entirely disreputable so-called marketing agreement" and laments the "wholesale displacement and/or abolition of" locally produced non-entertainment programming by CBS in favor of its standard commercial network and syndicated fare. Spectrum also contends that grant of the assignment would result in the loss of one of the nation's few minority-owned and -controlled television stations, as well as the loss of "unique minority and other non-entertainment programming" aired by Seller. Notwithstanding Spectrum's concerns, we note that the minority-controlled licensee here, Seller, has authorized the change to a network/syndicated format, a matter that is within its discretion as a licensee. Moreover, Section 310(d) of the Act precludes our consideration of an assignee or transferee other than the one before us. 47 U.S.C. §310(d). Our obligation, therefore, is to determine, within these constraints on our discretion, whether assignment of license for WGPR-TV to CBS, the proposed assignee, would serve the public interest.

CBS PROGRAMMING[16]

34. Serafyn's petition to deny the application stems from an October 23, 1994 episode of CBS's "60 Minutes" program, entitled "The Ugly Face of Freedom," in which Ukrainians were allegedly portrayed as "genetically anti-Semitic." Based upon this "60 Minutes" episode, the reaction of certain viewers, and the decision by CBS to stand by its broadcast as fair and accurate, Serafyn urges the Commission to designate for hearing or deny the CBS application on two grounds: (1) news distortion; and (2) failure to meet public interest obligations by not serving the needs of the Ukrainian-American community. At the least, Serafyn asserts, the Commission must defer action on the application pending the outcome of a personal attack complaint emanating from that broadcast filed with the Commission. We deny Serafyn's petition.

Alleged news distortion

35. In support of his news distortion allegation, Serafyn points to twelve instances of alleged news distortion presented in "The Ugly Face of Freedom" segment. They are: (1) the out-of-context comments from an interview with Rabbi Yaakov Bleich; (2) the decision "not to accept any help" from a Professor Luciuk, who offered his services to

[15] Spectrum, as well as petitioner Serafyn, allege that CBS's failure to timely submit to the Commission the Equipment Loan Agreement and the Facilities Improvement Agreement is an omission which violates the Commission's reporting rule requiring the updating of material information, Section 1.65. Not until the issuance of a Public Notice released on June 1, 1995 (No. 54161) did the Commission expressly require the disclosure of LMAs in television assignment and transfer-of-control applications. Thus, at the time Seller and CBS filed their LMA, in conjunction with the assignment application, they were under no obligation to do so. Accordingly, the failure to submit agreements corollary to that LMA does not constitute a violation of Section 1.65. Moreover, CBS's voluntary submission of the two agreements in response to a staff inquiry on financial aspects of the LMA negate any suggestion that there has been an intent to conceal information.

[16] We have recently conditioned our approval of the assignment of license of WPRI-TV, Providence, Rhode Island, to CBS on the resolution of Serafyn's allegations relating to CBS programming. File No. BALCT-950315KE. In the WPRI-TV assignment proceeding, Oleg Nikolyszyn, a viewer of that station, filed a petition to deny nearly identical to that filed here by Serafyn. Thus, our findings here apply with equal force to that proceeding.

the program editor and producer: (3) the "hundreds" of post-broadcast letters sent to CBS by various persons; (4) the "intentional mistranslation" of the Ukrainian word for "Jew" as "Kike"; (5) the false claim that the Galicia Division was responsible for the killing of Jews in Ukraine; (6) the questionable war footage and a "discredited" photograph; (7) the footage of Boy Scouts as "evidence" of Nazism in Ukraine; (8) the militaristic soundtrack over the footage of Ukrainian Boy Scouts; (9) the "falsely stated" representations that Ukrainian peasants are in possession of nuclear weapons; (10) the "slandering" of the memories of former Ukrainian leaders; (11) the "falsely" stated representations that Jews are leaving Ukraine because of the anti-Semitism of the Ukrainians; and (12) the lack of basis for the allegation that Ukrainians are "genetically anti-Semitic."

36. The Commission has long ruled that it will not attempt to judge the accuracy of broadcast news reports or to determine whether a reporter should have included additional facts. *E.g., KMPC, Station of the Stars, Inc.*, 14 Fed. Reg 4831 (1949); *see also Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949). Such authentication by the Commission would "cast the chill of omnipresent government censorship" over the broadcaster's independent news judgment. *Mrs. J.R. Paul*, 26 FCC 2d 591, 592 (1969). However, intentional distortion of news constitutes an act counter to the public interest. *Hunger in America*, 20 FCC 2d 143, 151 (1969). Thus, in balancing First Amendment and public interest concerns, the Commission will not attempt to draw inferences of distortion from the content of a broadcast, but it will investigate where allegations of news distortion are supported by "substantial extrinsic evidence" that the licensee has deliberately distorted its news report. *Mrs. J.R. Paul*, 26 FCC Rcd at 591-92. "Extrinsic evidence," that is, evidence outside the broadcast itself, includes written or oral instructions from station management, outtakes, or evidence of bribery. *Hunger in America*, 20 FCC 2d at 151. Our assessment of allegations of news distortion, in sum, focuses on evidence of intent of the licensee to distort, not on the petitioner's claim that the true facts of the incident are different from those presented.

37. Here, Serafyn does not challenge the standard by which the Commission assesses allegations of news distortion. However, he argues that because his allegations are included in a petition to deny the CBS assignment application, the pleading standard of Section 309(d) of the Act adheres rather than the "extrinsic evidence" standard delineated above. Section 309(d) provides that the Commission must designate for hearing a matter in which the petitioner presents a "substantial and material question of fact." Facts that are "material" are those that the Commission considers relevant to making its public interest determination. H.R. Rep. No 1800, 86th Cong., 2d Sess. 12, *reprinted in* 1960 U.S. Code Cong. & Admin. News 3516, 3520.

38. The Commission has determined that an allegation of news distortion raises a "material" question only if such complaints are accompanied by extrinsic evidence of possible deliberate distortion of the news by the licensee, including its principals, top management, or news management. *See Hunger in America*, 20 FCC 2d at 150 (Extrinsic evidence of news distortion which implicates licensee raises "serious questions" as to the character qualifications of that licensee.). Serafyn therefore must satisfy the threshold extrinsic evidence standard in order to elevate its allegations to the level of "substantial and material" questions of fact. We acknowledge that this burden of pleading is quite heavy, but the Commission has intentionally made it so. Any lesser burden would thrust the Commission into "an impenetrable thicket" of reviewing editing processes and adjudging editorial judgment, *The Selling of the Pentagon*, 30 FCC 2d at 152-153, a function inconsistent with the First Amendment and with the national commitment to the principle that debate on public issues should be "uninhibited, robust, [and] wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

39. In this case, we note that the twelve enumerated instances of alleged news distortion which are cited by Serafyn do not, with three exceptions, serve as extrinsic evidence of CBS's intent to distort. The remaining nine instances either constitute disputes as to the truth of the event, that is, that the facts of a given incident are different from those presented, *see Hunger in America*, 20 FCC 2d at 150-51, or "embellishments concerning peripheral aspects" of news reports or "attempts at window dressing which concerned the *manner* of presenting the news." *WPIX, Inc.*, 68 FCC 2d 381, 385-86 (1978)(emphasis in original). The first exception, the first one enumerated by Serafyn, comprises comments of Rabbi Bleich utilized in the "60 Minutes" episode which were purportedly taken out of context, as evidenced by outtakes of the full interview of Bleich by CBS. These outtakes, contained in a transcript of the interview submitted by Serafyn, may properly serve as circumstantial evidence of intent. *See Galloway v. FCC*, 778 F.2d 16, 21 (D.C. Cir. 1985). The outtakes, according to Serafyn, show that CBS expunged Rabbi Bleich's preliminary comments indicating that anti-Semitism in Ukraine is a trait of only "the nationalists, the negative nationalists or the rightists," but left in the actual broadcast only his follow-up comments, which stated: "Yeah. Well, that's not a secret. They're saying that. They want the Jews out. They want the Jews out, and they want the Russians out. And they want everybody else out that's not an ethnic Ukrainian." Bleich's statements, as broadcast, according to Serafyn, appear to support CBS's central premise that all Ukrainians, not just the right-wing nationalist faction, are anti-Semitic. We disagree.

40. We observe that Rabbi Bleich's latter, allegedly misleading comments immediately followed CBS reporter Morley Safer's statement in the broadcast that only "some Ukrainians" are anti-Semitic, qualifying, as had Rabbi Bleich in his full interview, that not all Ukrainians were the focus of the program. Indeed, that the focus of the "60 Minutes" program was upon only a certain sector of the Ukrainian population is evident from at least three other express references by Safer to "Ukrainian ultranationalist parties," "the Social Nationalists," and other apparently isolated groups of Ukrainians. Thus, rather than constitute a distortion, Rabbi Bleich's negative comments about Ukrainians as utilized can rightly be viewed as limited to only a segment of the Ukrainian population, not all Ukrainians. Nor do we find intent to distort because CBS did not include in its episode positive statements about Ukraine made by Rabbi Bleich in his interview. We believe that the determination of what to include and exclude from a given interview constitutes the legitimate "journalistic judgment" of a broadcaster, a matter beyond the Commission's "proper area of concern." *E.g., Hon. Harley O. Staggers*, 25 RR 2d 413, 414 (1972), *Democratic National Convention Television Coverage*, 16 FCC 2d 650, 656 (1969). Accordingly, we find, in sum, that the outtakes of the rabbi's interview fail to demonstrate CBS's intent to

distort. Indeed, as we have stated in a prior case involving allegations of news distortion, we can conceive of situations where the documentary evidence of deliberate distortion would be sufficiently strong to require an inquiry, "e.g., where a 'yes' answer to one question was used to replace a 'no' answer to an entirely different question. . . ." *The Selling of the Pentagon*, 30 FCC 2d at 153. That type of situation clearly is not presented here.

41. The two remaining pieces of evidence external to the program cited by Serafyn relate to CBS's pre-broadcast refusal to utilize Professor Luciuk, a Ukrainian specialist who volunteered his expertise to CBS, and post-broadcast letters sent by "hundreds" of persons to CBS protesting the program's facts. This evidence falls far short of demonstrating intent to distort the "60 Minutes" program at issue. Neither the professor nor the letter-writers are "insiders," that is, employees or members of management of CBS. Nor are they persons with direct personal knowledge of intent to falsify. Moreover, determinations as to which experts to utilize is a decision solely within the province of the broadcaster. And letters sent by viewers subsequent to the broadcast is evidence clearly incapable of going to intent, because intent is a state of mind accompanying an act, not following it. Serafyn's extrinsic evidence in total, therefore, does not satisfy the standard for demonstrating intent to distort. Failure to meet public interest obligations vis-a-vis Ukrainian-Americans

42. In its program service statement relating to issues of public concern in the Detroit area, a statement required by Section IV of FCC Form 314 and included in CBS's application as Exhibit K, CBS states, in part:

> CBS will broadcast programming addressing issues of importance to the community and will present contrasting viewpoints concerning such issues. . . . CBS will also review the Issues/Programming Reports prepared by the Station and, based upon this information, CBS's experience in the Detroit market and CBS's long experience in broadcasting, CBS plans to initiate direct contact with community leaders forthwith to discuss evolving issues and problems

Serafyn contends that the CBS application should be denied because the programming statement submitted by CBS in conjunction with its application "is neither credible nor a reliable means of predicting future conduct." CBS's current programming, Serafyn argues, as well as "what can be expected from CBS in the future, indicates that it has not and will not meet obligations to air programs in the public interest." According to Serafyn, maligning the character of a group as CBS allegedly did in the "60 Minutes" episode places CBS's overall programming proposals in question.

43. CBS's programming exhibit contains the requisite "brief narrative description" of its proposed issue-responsive programming for the Detroit audience. The Commission's objective in requiring such a narrative is to insure that broadcast applicants are cognizant of the Commission's policies and that they will comply with them. *See Request for Declaratory Ruling Concerning Programming Information in Broadcast Applications*, 3 F.C.C. Rcd 5467, 5468 (1988), *aff'd sub nom. Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir. 1990). As to Serafyn's allegation that CBS's current programming is an indicator of its inability to meet public interest programming responsibilities in Detroit, we emphasize that Serafyn's broad-based speculation derives from a single episode of a single CBS program, one which, as noted above, Serafyn has failed to demonstrate rises to the level of news distortion. Absent a showing that a licensee has followed "either a pattern of prejudice or policy of exclusion" or has consistently failed to respond to problems which, under the circumstances, the licensee could not reasonably or in good faith ignore, the Commission will accept a licensee's good faith programming judgments. *See, e.g., Rules and Policies to Further the Advancement of Black Americans in Mass Communications*, 49 RR 2d 442, 444 (1981). Even if the "60 Minutes" episode represented a "hateful attack," as characterized by Serafyn, such an isolated instance does not, and indeed, cannot, rise to the level of "a pattern of prejudice," the burden required of a petitioner who seeks to make a *prima facie* case that a licensee has abused its discretion. *Philadelphia Television Stations Serving Philadelphia, Pennsylvania*, 5 FCC Rcd 3847, 3848 (1990), *recon. denied*, 6 FCC Rcd 4191 (1991). Serafyn, therefore, has not met its burden of pleading in alleging that CBS programming has not or cannot satisfy its public interest obligations.

REQUEST FOR WAIVER OF THE ONE-TO-A-MARKET RULE

44. CBS is the licensee of WWJ(AM) and WYST(FM), both in Detroit. Its common ownership of those stations and WGPR-TV, also in Detroit, would be inconsistent with the one-to-a-market rule. That rule bars common ownership of television and radio stations in the same market. 47 C.F.R. §73.3555(c). CBS, therefore, requests waiver of the rule. Noting that Detroit is the ninth largest television market in the United States and contains 51 separate broadcast "voices," or owners, CBS requests waiver of the one-to-a-market rule relying on the "top 25 markets/30 voices" standard, enunciated in *Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741, *reconsidered in part*, 4 FCC Rcd 6489 (1989).

45. Serafyn argues that despite the Commission's adoption of the "top 25/30 voices standard," waiver requests of the one-to-a-market rule must be assessed on a case-by-case basis. Here, Serafyn contends, referring to the "60 Minutes" broadcast pertaining to Ukrainians, CBS "has no intention of providing for any viewpoint other than its own." Grant of CBS's waiver request, Serafyn concludes, will decrease the diversity of viewpoints in the Detroit market, leaving Ukrainian-Americans to "defend themselves from attack" from three CBS-owned and -operated broadcast outlets.

46. In *Second Report and Order*, 4 FCC Rcd 1741, 1751, *reconsidered in part*, 4 FCC Rcd 6489 (1989), the Commission concluded, as CBS notes, that it "will look favorably" upon, and will be "predisposed to grant," waiver requests involving radio and television station combinations in the top 25 markets, as defined by Arbitron Ratings Company, where at least 30 separately owned, operated and controlled broadcast licensees, or "voices," will remain after consummation of the proposed combination. Yet, it is also true, as Serafyn notes, that while the Commission emphasized its inclination to grant waivers meeting the "top 25 markets/30 voices" standard, it left "open" the possibility that petitioners who submit petitions to deny "might be able to rebut the request for a waiver." *Id.* at 1752.

47. Serafyn attempts to rebut application of the presumptive waiver standard on diversity grounds. We remain committed to our longstanding diversity objective. But that

objective may conflict with other Commission goals, including facilitating efficiency gains, cost savings and programming benefits created by combinations. *See id.* at 1752. Thus, in establishing the "top 25/30 voices" presumptive standard, while the Commission recognized that permitting common ownership of more than one broadcast service in a market might "to some minimal degree" affect diversity, it weighed that effect against the benefits emanating from such ownership. *Id.* The Commission balanced those concerns, finding that diversity would be sustained where there remained at least 30 separate "voices," or owners, in the top 25 markets, elements which would preclude any single station or owner from obtaining "undue sway over public opinion." *Id.* at par 77. Here, CBS will be the licensee of three broadcast outlets in Detroit, a market containing approximately 68 radio and television stations, owned by more than 50 separate persons. Serafyn has presented no evidence that CBS will dominate this market. Nor has Serafyn established, as discussed above, that the broadcast of "The Ugly Face of Freedom" renders CBS an unfit licensee. In sum, Serafyn has failed to rebut the presumptive standard, that is, to demonstrate that the point of equilibrium fixed by the Commission in adopting the "top 25/30 voices" standard would shift as a result of our grant of this application so as to adversely affect diversity in the Detroit market. Accordingly, we conclude that grant of the one-to-a-market waiver requested by CBS is justified.

CONCLUSION

48. For the reasons above, we find that Spectrum and Serafyn have failed to present a substantial and material question of fact that grant of the application before us would be in inconsistent with the public interest. We also find that CBS is legally, financially, and otherwise qualified, and that grant of the assignment application would serve the public interest.

49. Accordingly, IT IS ORDERED that the petitions to deny separately filed by Spectrum Detroit and by Alexander J. Serafyn ARE HEREBY DENIED.

50. IT IS FURTHER ORDERED that the request for waiver of the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(b), IS HEREBY GRANTED, and the application for assignment of the license for WGPR-TV, Detroit, Michigan, from WGPR, Inc. to CBS, Inc. IS GRANTED.

51. IT IS FURTHER ORDERED that the condition placed upon the grant of the assignment of license of WPRI-TV, Providence, Rhode Island, BALCT-950315KE, IS REMOVED and that application IS HEREBY UNCONDITIONALLY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision of New York — CUID Nos. NY1413 (Brooklyn) NY1414 (Bronx)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1995; Released: May 5, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tiers in the communities designated above. Operator has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Forms 393 in response; Operator also filed amended and supplemental Form 393 filings on December 2, 1993.

5. Operator asserts that its monthly prices for its CPS tiers are justified by its benchmark filings because its prices are lower than the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedule A of Part III of its FCC Form 393, Cablevision did not correctly account for its income tax expense. By placing entries in the column, Cablevision confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Cablevision incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. Also, Cablevision failed to include federal taxes in Column G of Schedule C for its customer leased equipment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[11] By understating its tax entries in Column G,

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also* Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculated Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. Because of this error, Operator has failed to demonstrate that its prices for the CPS tiers were not unreasonable. Therefore, we must recalculate the Inflation Adjustment Factor on Form 393, Part II, Worksheet 1 on the basis of the most accurate data currently available for the date for which Operator filed.[12] In its amended FCC Form 393 filings, Operator calculated its Inflation Adjustment Factor as of the end of September 1993 using data released by the U.S. Department of Commerce on August 31, 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.028 as the Inflation Adjustment Factor through September 1993 for both franchise areas addressed in this Order.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the period in question. Operator's showing justifies the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[13]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas relating to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[14] to May 14, 1994 which exceeded the maximum prices for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charges per tier as of March 31, 1994 for Tiers 2,3,4,5,6 and 7 (lines A6b through A6g) to equal the maximum prices in each franchise area set forth in Appendix B (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
NY1413	9/2/93	8/31/93
NY1414	9/2/93	8/31/93

Appendix B

CUID No.	Tier	Actual Rates	Maximum Permitted Rates
NY1413	2	$12.38	$11.64
	3	$1.09	$1.03
	4	$1.82	$1.71
	5	$3.28	$3.08
	6	$3.64	$3.42
	7	$1.82	$1.71
NY1414	2	$12.38	$11.64
	3	$1.09	$1.03
	4	$1.82	$1.71
	5	$3.28	$3.08
	6	$3.64	$3.42
	7	$1.82	$1.71

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[13] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 1, 1995

Released May 5, 1995

IN REPLY REFER TO:
DA 95-1001

J. Christopher Redding
Dow, Lohnes & Albertson
1255 Twenty-Third Street, N.W., Suite #500
Washington, DC 20037

Re: Vantage Cable Associates, L.P., CUID No. CO0297 (Lyons, Colorado)

Dear Mr. Redding:

This letter is in reference to your Motion to Dismiss filed with the Commission on March 17, 1994, with respect to a complaint filed February 28, 1994, against the price Vantage Cable Associates, L.P. was charging for cable programming service in Lyons, Colorado, CUID No. CO0297. In that motion, you state that Vantage Cable is not required to justify its rates prior to May 15, 1994, because Vantage Cable's Lyons, Colorado system has fewer than 1,000 subscribers. Based on the information you have provided, it appears that the Town of Lyons system qualifies as a "small system" pursuant to 47 C.F.R. § 76.901(c), and was therefore exempt from rate regulation until May 15, 1994.

We will rule at a later date on Vantage Cable's justification under the Commission's revised rate regulations of its cable programming service rates in Lyons, Colorado beginning May 15, 1994.

Should you have any questions regarding this matter, please contact Gwendolyn G. Flowers at (202) 416-1112.

Sincerely,

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

cc: John Kilian, II, Vice President-Operations, Vantage Cable Associates, L.P. Town of Lyons (Attention: Robert G. Freeman, Jr.)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Illinois, Inc. CUID Nos. IL0563 (Wheeling), IL0558 (Mount Prospect), IL0554 (Arlington Heights), IL0561 (Schaumburg), IL0557 (Hanover Park), IL0840 (Glenview);

TCI of New York, Inc. CUID No. NY0117 (Buffalo);

TCI Cablevision of Pennsylvania, Inc. CUID Nos. PA0173 (Westview), PA0695 (Bellevue), PA0709 (Shaler), PA0716 (McCandless), PA0693 (Baldwin), PA1215 (Brentwood), PA0889 (Whitehall)

Benchmark Filings to Justify Cable Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 27, 1995; Released: May 5, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices TCI of Illinois, Inc., TCI of New York, Inc., and TCI Cablevision of Pennsylvania, Inc. (collectively "Operators") were charging for their cable programming service ("CPS") tier in the communities referenced above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393s. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operators assert that their monthly CPS prices are justified by their benchmark filings because their prices are less than or equal to their maximum permitted charges. Upon review, we have found no apparent errors that would result in Operators' actual CPS prices exceeding their maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operators in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Service Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which the Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operators. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable of New York CUID No. NY0234
Southern Manhattan, New York

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 5, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint was completed and served on Operator by the City of New York before September 1, 1993.[11] The Commission received the complaint on September 2, 1993.

5. Operator attempted to justify its CPS price through a Form 393 filed on November 15, 1993. Operator amended its justification on May 27, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12] and again on January 27, 1995, and on April 12, 1995 in response to letters which requested further clarification of Operator's amended showing.[13]

6. In its amended benchmark filing of February 7, 1995, Operator calculated a maximum permitted price for the CPS tier of $8.23 per month. However, Operator's actual price for the CPS tier was $8.45 per month. Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's submission, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In its Form 393 filing, Operator's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part II, Worksheet 1 and Form 393, Part I) listed its basic tier rate as being $10.97. Operator's rate card indicates that its actual monthly rate for the basic tier was $11.27. This figure is consistent with the rate shown on the cable bills

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"),* the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra.* Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended,* 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration,* 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration,* 9 FCC Rcd at 4189 n.195.

[11] The complaint was dated August 31, 1993 and states that it was mailed to Operator on that date. Operator has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider September 1, 1993, the date when the Commission's rate regulations became effective, as the service date.

[12] Cable Operators' Rate Justification Filings, DA 94-526 , 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] Letter from Andra Cunningham, FCC, to Arthur H. Harding, Counsel to Time Warner Cable of New York (January 5, 1995); letter from Andra Cunningham to Barry Rosenblum, President, Time Warner Cable of New York (March 27, 1995).

submitted by complainants. Accordingly, we changed the basic tier rate entered on Form 393, Part I, Worksheet 1, line 101A from $10.97 to $11.27.

b. Operator's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) count 28.5 channels on the basic tier. Apparently, Operator counted channel 37 as one-half of a rate-regulated channel. According to information supplied by Operator on January 27, 1995, channel 37 carried a rate- regulated non-satellite service (Manhattan Illustrated) for 89.5 hours per week and a pay-per-channel service that is not subject to rate regulation (Bravo) for 78.5 hours per week.

c. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework.[14] Because channel 37 was used to carry rate-regulated programming more than half the time that it was in use, it should have been counted as a full rate-regulated channel. We therefore increase the number of channels on the basic tier on Form 393, Part II, Worksheet 2, Line 220A from 28.5 to 29, and we calculate the Benchmark Channel Rate on Worksheet 2, Line 220 using 61 rate-regulated channels.

d. In reporting its capital costs of service installation and maintenance of equipment on Part III, Schedule A, Operator overdepreciated its vehicles, exceeding the net book value of the asset. This is in violation of Generally Accepted Accounting Principles. The remaining book value prior to applying the annual depreciation expense ($432,907) was less than the annual depreciation expense ($788,309). Therefore, the depreciation expense was decreased to $432,907 in order to match the remaining book value.

e. On Form 393, Part III, Schedule C, Operator depreciated its non-addressable converters over a useful life of 40.6 years. Operator did not explain why the useful life of its converters substantially exceeds the industry average of approximately 10 years. By depreciating its equipment over an excessively long useful life, an operator understates its annual depreciation costs and thereby could increase its CPS price. We therefore recalculate Operator's annual depreciation expense on non-addressable converters (and subsequent steps) using a 10 year useful life.[15] This adjustment increases Operator's annual depreciation expense for non-addressable converters from $24,000 to $97,500.

f. Because Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we must also recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which Operator filed Form 393.[16] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of October 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rates.

7. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $8.34 (plus franchise fee) for the period from the filing of the earliest complaint in this franchise area to May 14, 1994.[17]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the September 1, 1993 complaint against the cable programming service price charged by Operator in the area referenced in the caption, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community referenced above that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in this franchise area[18] to May 14, 1994 which exceeded the maximum price for this franchise area (plus franchise fee) per month, plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

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[14] *See* Viacom Cable, Nashville, Tennessee, CUID No. TN0148, DA 94-1151, para. 6a-6c (Cab. Serv. Bur., released Nov. 9, 1994).

[15] *Cf*. United Video Cablevision Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, para. 10b (Cab. Serv. Bur., released Nov. 9, 1994).

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[17] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the community listed herein for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price in this franchise area (plus franchise fee).[19]

12. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[19] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Staten Island Cable — CUID No. NY1312
A Division of Time Warner — (Staten Island, New York)
Cable Partners

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 27, 1995; Released: May 5, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price Staten Island Cable, a division of Time Warner Cable Partners ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because its price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division,
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sacramento Cable Television Company CUID Nos. CA1087, CA1088, CA1089, CA1092 (Sacramento)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1995; Released: May 5, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Sacramento Cable Television Company ("Operator") was charging for its cable programming service ("CPS") tier in Sacramento, California. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator requests that the Commission dismiss the complaint because complainant indicated a rate in response to question number 7 that includes the basic service rate and equipment charges. Operator's assertion does not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the complainant's response to question number 7 includes the rate for the CPS tier and because the attached bill indicates that the complainant received the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate and that he believed that rate was unreasonable. We therefore find the complaint valid and deny Operator's request for dismissal.

5. In its amended benchmark filing of May 17, 1994, Operator calculated a maximum permitted rate for the CPS tier of $9.44 per month (plus franchise fee). However, Operator's actual monthly charge for the CPS tier was $9.45 (plus franchise fee). Upon review of this filing, we found a minor mathematical error, the correction of which increases the maximum permitted rate to $9.45.[11] Thus, Operator's showing demonstrates that its monthly CPS price is justified by its benchmark filing because this price is equal to the maximum permitted charge. We found no additional apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator calculated a maximum initial permitted rate per channel of $0.378. This rate, when multiplied by the 25 channels on the CPS tier, results in a maximum permitted rate of $9.45, not $9.44.

[12] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that Operator's request to dismiss the complaint referenced herein IS DENIED.

7. IT IS FURTHER ORDERED that the complaint referenced herein against the cable programming service price charged by Operator in Sacramento, California IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Battlefield Cable Company CUID No. GA0088, Chickamauga

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1995; Released: May 5, 1995

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in Chickamauga, Georgia. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS price upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS price.[3] Under our rules, an operator may attempt to justify its price through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS price are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS price were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their price were in compliance with the revised rules from May 15, 1994 forward.[8] Operator is attempting to justify their price for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their price for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint was served on Operator on December 21, 1993 and received by the Commission on December 27, 1993. Operator filed FCC Form 393 in response.

5. In its benchmark filing, Operator calculated a maximum permitted CPS rate of $12.22 per month (plus franchise fee). Operator's actual monthly charge for its CPS tier was $12.46 (plus franchise fee). Thus, Operator has failed to show that its rate for the CPS tier was not unreasonable. Furthermore, upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to Operator's calculations in Form 393:

> In calculating its Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, Operator did not rely on the most currently available data released by the U.S. Department of Commerce.[11] Rather than relying on data released by the U.S. Department of Commerce on December 1, 1993, Operator relied on data released on August 31, 1993. We therefore must recalculate Operator's Inflation Adjustment Factor using the most accurate data currently available for the date for which Operator filed.[12] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Operator used in justifying its rates, of 1.034.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), as *amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See Cable Television Rate Regulation: Questions and Answers Relating to FCC Form 393*, Q and A No. 10 (released July 30, 1993) ("The most recent (as of the completion date of the form) GNP-PI numbers available to the public should be used.").

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

6. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator's showing justifies a maximum reasonable CPS tier price of $12.13 per month (plus franchise fee) for the period from December 27, 1993 to May 14, 1994.[13]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Operator in Chickamauga, Georgia IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in Chickamauga, Georgia that portion of the amount paid for cable programming service for the period from December 27, 1993[14] to May 14, 1994 which exceeded $12.13 (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Chickamauga, Georgia for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $12.13 (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cencom Cable N.E. Connecticut, Inc. CUID Nos.
CT0153, Ashford
CT0154, Brooklyn
CT0155, Canterbury
CT0156, Chaplin
CT0157, Columbia
CT0158, Coventry
CT0159, Eastford
CT0160, Hampton
CT0161, Lebanon
CT0162, Mansfield
CT0163, Pomfret
CT0164, Scotland
CT0165, Thompson
CT0166, Windham
CT0167, Willington
CT0168, Woodstock

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 5, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tiers in the communities designated above.[1] Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that its CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that its prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

4. The first valid CPS complaint in each of the franchise areas which is the subject of this Order was completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Forms 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on March 22, 1995, in response to an inquiry by Commission staff.[12]

5. Operator offers two different CPS tiers in each franchise area and asserts that its monthly prices for both tiers are justified by its benchmark filings because its prices are lower than or equal to the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that Operator has not correctly

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[1] Operator is a wholly owned subsidiary of Crown Media, Inc., which was purchased by Charter Communications, Inc. subsequent to the time period covered by this Order. As required by the context, the term "Operator" as used in this Order includes Operator's successors in interest.

[2] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189, n.195.

[12] For example, Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operator's Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in its Forms 393:

a. In Column G of Schedules A and C of Part III of its FCC Forms 393, Operator did not report any income tax expense due to a net operating loss.[13] Operator is a Subchapter C corporation and is therefore required to pay corporate income tax.[14] Therefore, Operator must complete Column G on the basis of its statutory tax rate, regardless of the rate it actually paid in any given year.[15] By omitting its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. Wetherefore calculate Operator's federal income tax allowance on Column G of Schedules A and C on the basis of a 34% corporate tax rate.[16] Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[17] In accordance with this principle, we recalculate Column G of Schedules A and C (and subsequent steps) using a grossed-up federal income tax rate of 51.51% of Operator's return on investment.

b. Operator's Form 393, Worksheet 1, Line 104 entries do not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regulations, the monthly equipment cost figures it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 entries.[18] However, Operator's entries on Line 104 differed substantially from its entries on Line 34. We therefore adjusted Line 104 to equal the amounts entered on Line 34.

c. In its amended filings, Operator states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS prices. If Operator had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its prices), and if, based on this data, its Forms 393 indicated that its prices were reasonable, then Operator would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[19] However, the errors described above are of such a magnitude that the CPS prices were excessive even when set.

d. Moreover, the figures Operator used are not consistent with data on which it should have relied in setting its CPS prices. According to Operator's amended filings, Operator calculated its prices prior to September 1, 1993. Operator used Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on May 28, 1993, to complete Lines 122, 123 and 125, but Operator claimed an Adjustment Time Period extending through September 1993 (Line 124), which is inconsistent with an attempt to justify rates based on May 1993 data. Operator's calculation of the Inflation Adjustment Factor is thus incorrect.

e. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which Operator filed.[20] On its amended Forms 393, Operator entered 12 months on Line 124, indicating that its filings were as of the end of September 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through September 1993, the base date Operator used in justifying its rates, of 1.028.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the periods in question. Operator's showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[21]

7. ACCORDINGLY, IT IS ORDERED that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the areas

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[13] Facsimile from Trudi Foushee, Esq., Green & Foushee, to FCC (March 21, 1995)

[14] *Id.*

[15] *See* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 15 (released July 30, 1993).

[16] Facsimile from Trudi Foushee, Esq., Green & Foushee, to FCC (March 21, 1995)

[17] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that it has a state or federal income tax obligation.") *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

[18] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators has restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[19] Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*).

[20] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[21] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we has accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

referenced in the caption and at Appendix A, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities addressed herein that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[22] to May 14, 1994 which exceeded the maximum prices for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to its CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file reports with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing the calculation thereof, and describing its plans to implement the refunds within 60 days of Commission approval of those plans.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charges per tier as of March 31, 1994 for Tiers 2 and 3 (Lines A6b and A6c) to equal the maximum prices in each franchise area set forth in Appendix B (plus franchise fee).[23]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Subsidiary	Date First Complaint Filed with FCC	Date Complaint Served
CT0153	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0154	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0155	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0156	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0157	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0158	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0159	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0160	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0161	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0162	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0163	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0164	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0165	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT016	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93

[22] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[23] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

CT0167	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93
CT0168	Cencom Cable N.E. Connecticut, Inc.	9/3/93	9/1/93

Appendix B

CUID No.	Actual Rates for CPS Tier 2	Maximum Permitted Rates for CPS Tier 2
CT0153	$9.41	$9.19
CT0154	$9.41	$9.19
CT0155	$9.41	$9.19
CT0156	$9.41	$9.19
CT0157	$9.41	$9.19
CT0158	$9.41	$9.19
CT0159	$9.41	$9.19
CT0160	$9.41	$9.19
CT0161	$9.41	$9.19
CT0162	$9.41	$9.19
CT0163	$9.41	$9.19
CT0164	$9.41	$9.19
CT0165	$9.41	$9.19
CT0166	$9.41	$9.19
CT0167	$9.41	$9.19
CT0168	$9.41	$9.19

CUID No.	Actual Rates for CPS Tier 3	Maximum Permitted Rates for CPS Tier 3
CT0153	$4.39	$4.29
CT0154	$4.39	$4.29
CT0155	$4.39	$4.29
CT0156	$4.39	$4.29
CT0157	$4.39	$4.29
CT0158	$4.39	$4.29
CT0159	$4.39	$4.29
CT0160	$4.39	$4.29
CT0161	$4.39	$4.29
CT0162	$4.39	$4.29
CT0163	$4.39	$4.29
CT0164	$4.39	$4.29
CT0165	$4.39	$4.29
CT0166	$4.39	$4.29
CT0167	$4.39	$4.29
CT0168	$4.39	$4.29

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cencom Cable Entertainment, Inc. CUID Nos. SC0518, Kershaw County, and SC0130, Camden

Cencom Cable Income Partners II, L.P. CUID Nos. SC0218, Williamston, and TX0803, Angleton

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 5, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (each "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above.[1] Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

4. The first valid CPS complaint in each of the franchise areas which is the subject of this Order was completed and served on the relevant Operator and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Forms 393 in response; Operators have also filed amended and supplemental Form 393 filings, most recently on March 22, 1995, in response to inquiries by Commission staff.[12]

5. For CUID No. SC0130, Camden, South Carolina, on November 15, 1993, Cencom Cable Entertainment, Inc. ("Entertainment Operator") filed a Motion to Dismiss the complaint referenced in Appendix A because the complainant, an individual subscriber, failed to submit a copy of his cable bill. On February 3, 1994, the complainant filed an affidavit stating that he had submitted the bottom two-thirds portion of his monthly cable bill which showed the account number, billing date, due date, an account history for the previous month and other miscellaneous information. We have examined the complainant's cable bill which was attached to his initial complaint and find it sufficient for the purpose of challenging the reasonableness of a rate increase. In general, we will find valid any complaint that states a claim and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best imple-

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[1] Operators are wholly owned subsidiaries of Crown Media, Inc., which was purchased by Charter Communications, Inc. subsequent to the time period covered by this Order. As required by the context, the term "Operators" as used in this Order includes Operators' successors in interest.

[2] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent either Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operators' prices for the period after May 14, 1994 may be required to reflect the fact that Operators' prices during the earlier period, which are used as the starting point to calculate their prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189, n.195.

[12] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

ments the mandate of the 1992 Cable Act. We therefore find the complaint valid and deny Entertainment Operator's motion.

6. Operators assert that their monthly CPS tier prices are justified by their benchmark filings because their prices are lower than or equal to the maximum permitted charges as calculated in the filings. Upon review of Operators' Form 393 filings, we have found that Operators have not correctly calculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in their Forms 393:

a. For CUID Nos. SC0518, Kershaw County, South Carolina, and SC0130, Camden, South Carolina, Entertainment Operator did not report any income tax expense in Column G of Schedules A and C of Part III of its FCC Forms 393 due to a net operating loss.[13] Entertainment Operator is a Subchapter C corporation and is therefore required to pay corporate income tax.[14] Therefore, Entertainment Operator must complete Column G on the basis of its statutory tax rate, regardless of the rate it actually paid in any given year.[15] By omitting its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore calculate Entertainment Operator's federal income tax allowance on Column G of Schedules A and C on the basis of a 34% corporate tax rate.[16] Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[17] In accordance with this principle, we recalculate Column G of Schedules A and C (and subsequent steps) using a grossed-up federal income tax rate of 51.51% of Entertainment Operator's return on investment.

b. For CUID No. SC0130, Camden, South Carolina, Entertainment Operator's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part I, and Form 393, Part II, Worksheet 1) reflect 27 satellite channels and 34 rate-regulated channels. Our examination of the channel line-up provided by Entertainment Operator in its amended filings, however, reveals only 25 satellite channels and 32 rate-regulated channels. Entertainment Operator apparently counted channels from its channel line-up for March 31, 1994. We therefore reduce the number of CPS-tier channels on Form 393, Part I, and Form 393, Part II, Worksheet 1, Line 102 from 23 to 21. We also reduce the number of rate-regulated channels used in calculating Entertainment Operator's benchmark (Form 393, Part II, Worksheet 1, Line 121) from 34 to 32, and we reduce the number of satellite channels used in claculating the benchmark from 27 to 25.

c. Operators' Form 393, Worksheet 1, Line 104 entries do not represent their current monthly equipment revenue as of the initial date of regulation. Since Operators restructured their rates, including their equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regulations, the monthly equipment cost figures they entered on Line 34 of Step G of Part III should have been close or identical to their Line 104 entries.[18] However, Operators' entries on Line 104 differed substantially from their entries on Line 34. We therefore adjusted Line 104 to equal the amounts entered on Line 34.

d. In their amended filings, Operators state that they calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data they relied on when they set their CPS prices. If Operators had done so correctly (i.e., if they had completed Form 393 with accurate data, including the most recent inflation data available as of the time they set their prices), and if, based on this data, their Forms 393 indicated that their prices were reasonable, then Operators would have successfully justified their prices under paragraph 94 of the *Third Order on Reconsideration*.[19] However, the errors described above are of such a magnitude that the CPS prices were excessive even when set.

e. Moreover, the figures Operators used are not consistent with data on which they should have relied in setting their CPS prices. According to Operators' amended filings, Operators calculated their prices prior to September 1, 1993. Operators used Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on May 28, 1993, to complete Lines 122, 123 and 125, but Operators claimed an Adjustment Time Period extending through September 1993 (Line 124), which is inconsistent with an attempt to justify rates based on May 1993 data. Operators' calculation of the Inflation Adjustment Factor is thus incorrect.

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[13] Facsimiles from Trudi Foushee, Esq., Green & Foushee, to FCC (March 21, 1995)

[14] *Id.*

[15] *See* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 15 (released July 30, 1993).

[16] Facsimiles from Trudi Foushee, Esq., Green & Foushee, to FCC (March 21, 1995)

[17] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking , MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

[18] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[19] Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262 , FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*).

f. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which Operators filed.[20] On their amended Forms 393, Operators entered 12 months on Line 124, indicating that their filings were as of the end of September 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through September 1993, the base date Operators used in justifying their rates, of 1.028.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[21]

8. ACCORDINGLY, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that Entertainment Operator's Motion to Dismiss the complaint referenced in Appendix A for CUID No. SC0130 IS DENIED.

9. IT IS FURTHER ORDERED that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities addressed herein that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[22] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

11. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file reports with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing the calculation thereof, and describing their plans to implement the refunds within 60 days of Commission approval of those plans.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[23]

13. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflects the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Subsidiary	Date First Complaint Filed with FCC	Date Complaint Served
SC0218	Cencom Cable Income Partners II, L.P.	2/22/94	2/14/94
TX0803	Cencom Cable Income Partners II, L.P.	10/5/93	9/30/93
SC0518	Cencom Cable Ent., Inc.	1/26/94	1/9/94
SC0130	Cencom Cable Ent., Inc.	10/15/93	10/12/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
SC0218	$14.30	$14.08
TX0803	$12.53	$12.41
SC0518	$17.11	$16.67
SC0130	$17.11	$15.94

[20] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[21] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[22] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[23] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable TV — CUID Nos. NM0039 (Deming); NM0122 (Pojoaque); FL0496 (Dunnellon)

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1995; Released: May 5, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Century Cable TV ("Century") charges for its cable programming service ("CPS") tiers in the above-captioned communities (the "subject communities"). *See* Appendix for a list of the subject communities and the number of basic and CPS channels Century offered in each community both before and after September 1, 1993. Rather than attempting to justify its prices through a benchmark or cost of service showing, Century responded to the complaints in Deming, New Mexico and Pojoaque, New Mexico by stating that it has no CPS tier in those systems. On December 21, 1994, Century submitted rate cards and channel line-up cards in support of its claim that CPS tiers did not exist as of September 1, 1993, and still do not exist, in either Deming or Pojoaque. Century did not respond to the complaint challenging the CPS rate in Dunnellon, Florida.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[4]

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[9]

II. BACKGROUND

4. The Cable Services Bureau has released orders resolving letters of inquiry ("LOIs") regarding Century's systems in Huntington, West Virginia; Morgantown, West Virginia; Muncie, Indiana; Owensboro, Kentucky; Yuma, Arizona; Brunswick, Georgia; and San Juan, Puerto Rico.[10] Relying on the Commission's *Going Forward Order*,[11] the Bureau's orders addressed the restructured service offerings implemented in these communities beginning September 1, 1993, in which Century eliminated its CPS tiers and offered instead only a basic service tier and a few a la carte channels. In each of these orders, the Bureau found that Century's restructured service offerings do not constitute a clear evasion of our rate rules. Specifically, the Bureau found that Century did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other channels, the orders permit Century to treat its a la carte packages as new product tiers that may be priced at market levels under the *Going Forward Order*.

5. Since the LOI orders found that the elimination of Century's CPS tiers does not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as a new product tier, there were no CPS tiers in those communities, as of September 1, 1993, that were subject to rate regulation pursuant to

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[2] 47 C.F.R. § 76.956.

[3] 47 C.F.R. § 76.956(b).

[4] *Id.*

[5] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"); 47 C.F.R. § 76.922(b).

[7] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[8] *Id.*

[9] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[10] *See Century Cable TV, Huntington, West Virginia*, LOI-93-49, DA 94-1314 (Cab. Serv. Bur. released Nov. 25, 1994); *Century Cable TV, Morgantown, West Virginia*, LOI-93-34, DA 94-1358 (Cab. Serv. Bur. released Dec. 2, 1994); *Century Cable TV, Muncie, Indiana*, LOI-93-18, DA 94-1354 (Cab. Serv. Bur. released Dec. 2, 1994); *Century Cable TV, Owensboro, Kentucky*, LOI-93-45, DA 94-1361 (Cab. Serv. Bur. released Dec. 2, 1994); *Century Cable TV, Yuma, Arizona*, LOI-93-39, DA 94-1360 (Cab. Serv. Bur. released Dec. 2, 1994); *Century Cable TV, Brunswick, Georgia*, LOI-93-44, LOI-94-4, DA 94-1426 (Cab. Serv. Bur. released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, LOI-93-38, DA 94-1425 (Cab. Serv. Bur. released Dec. 12, 1994).

[11] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).

Section 76.922 of our rules. Therefore, the Bureau subsequently dismissed all FCC Form 329 complaints filed against Century in each of those seven communities.[12]

III. DISCUSSION

6. The rate cards and channel line-up cards submitted by Century for Deming and Pojoaque indicate that Century restructured its service offerings on September 1, 1993 in essentially the same way that it did for the seven areas mentioned above where LOI orders have been issued. Although Century did not respond to the complaint in Dunnellon, Florida, the complainant attached rate cards and channel line-up cards effective May 1, 1993 and80 September 1, 1993 which show that the same type of restructuring also took place in Dunnellon on September 1, 1993.[13] Specifically, Century discontinued its CPS offerings and placed all of its channels into a single basic service tier, except for a few channels which it offered on an a la carte basis. In the subject communities, Century offered two to four a la carte channels. Similarly, Century's a la carte offerings consisted of three to six channels in the above-mentioned areas where LOI orders have been issued.

7. We feel that we have sufficient information regarding Century's restructured offerings in the subject communities to conclude, in accord with the *Going Forward Order*, that they should be treated the same way that we treated Century's restructured offerings in the seven communities where we issued LOI orders. As in these latter communities, although the instant restructuring resulted in the elimination of Century's CPS tiers, the small number of channels that were offered in the a la carte packages did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the LOI orders, we will allow Century to treat its a la carte packages in the subject communities as new product tiers even though they would not qualify as new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier. Thus, we need not rule on the FCC Form 329 complaints filed against Century in the subject communities because there were no CPS tiers subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993. In addition, nothing in these complaints indicates that Century's new product tiers violate any of the conditions for establishing those tiers outlined in the *Going Forward Order*.[14]

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that the a la carte packages created by Century Cable TV in the subject communities may be treated as new product tiers under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of Century Cable TV in each of the subject communities are DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] *See Century Cable TV*, CUID Nos. IN0094, WV0156, WV0378, KY0120, AZ0019, DA 94-1422 (Cab. Serv. Bur. released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, CUID No. PR0001, DA 94-1530 (Cab. Serv. Bur. released Dec. 20, 1994); *Century Cable TV, Brunswick, Georgia*, CUID No. GA0040, DA 94-1531 (Cab. Serv. Bur. released Dec. 20, 1994).

[13] The complainant also submitted several billing notices from the period from March 31, 1993 through September 30, 1993 which reflect the change. In addition, complainant enclosed a letter stating that Century eliminated its CPS tier on September 1, 1993 and created a three-channel a la carte package.

[14] We have excused one violation, *i.e.*, migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

APPENDIX

CUID	Community	8/31/93 *Pre-Regulation* Basic	Tiers	9/1/93 *Post Regulation* Basic	Tiers	A la Carte
NM0039	Deming	13	17	26	0	4
NM0122	Pojoaque	12	8	27	0	2
FL0496	Dunnellon	14	18	29	0	3

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vantage Cable Associates, L.P. CUID Nos.
WY0017 (Diamondville, WY)
WY0019 (Kemmerer, WY)

Benchmark Filings to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1995; Released: May 5, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Vantage Cable") was charging for its cable programming service ("CPS") tier in the communities designated above. Vantage Cable has chosen to attempt to justify its price through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Vantage Cable's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Vantage Cable and received by the Commission on the dates set forth on Appendix A. Vantage Cable filed FCC Forms 393 in response.

5. In its benchmark filings, Vantage Cable calculated different maximum permitted prices for the CPS tier in each of the two franchise areas addressed in this order. However, both of these price were below its actual price for the CPS tier. Thus, Vantage Cable has failed to demonstrate that its price for the CPS tier was not unreasonable. Upon review of Vantage Cable's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Vantage Cable's calculations in the Forms 393:

a. Vantage Cable's Form 393, Worksheet 1, Line 104 entries do not represent its current monthly equipment revenue as of the initial date of regulation. Since Vantage Cable restructured its rates, including its equipment rates, on September 1, 1993, the monthly equipment revenue figure it entered on Part II, Worksheet 1, Line 104 should have been close or identical to its equipment cost figure on Line 34 of Step G of Part III.[11] However, Vantage Cable's entries on these two lines varied substantially. Accordingly, we have changed Line 104 to equal the figure entered on Line 34 in each franchise area, as adjusted pursuant to paragraph 5a, *supra*.

b. Because Vantage Cable has failed to demonstrate that its prices for the CPS tier was not unreasonable, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Vantage Cable has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Vantage Cable's prices for the period after May 14, 1994 may be required to reflect the fact that Vantage Cable's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

the basis of the most acurate data currently available for the date for which Vantage Cable filed.[12] On its amended Form 393s, Vantage Cable calculated the Inflation Adjustment Factor as of the end of January 1994 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through Februar, 1994, the base date Vantage Cable used in justifying its rate for the franchise areas under consideration in this Order, of 1.039.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Vantage Cable has failed to justify the rate it was charging during the period in question. Vantage Cable's showing justifies the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[13]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service price charged by Vantage Cable Associates, L.P. in the areas referenced in the caption and at Appendix A herein ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Vantage Cable Associates, L.P. shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[14] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Vantage Cable Associates, L.P. shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Vantage Cable Associates, L.P. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Vantage Cable Associates, L.P. shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served	Inflation Adj. Factor
WY0017	2/22/94	2/08/94	1.039
WY0019	2/08/94	1/31/94	1.039

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
WY0017	$13.15	$11.60
WY0019	$13.15	$11.71

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rate must be adjusted in accordance with the most accurate data available at the time of analysis).

[13] This finding is based solely on the representations of Vantage Cable and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Vantage Cable Associates, L.P.'s prices for the period after May 14, 1994, upon completion of our review of Vantage Cable Associates, L.P.'s Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Western Colorado, Inc.	CUID No. CO0013 (Grand Junction)
TCI of Pennsylvania, Inc.	CUID Nos. PA0527 (McKeesport), PA0715 (Rostraver) and PA1855 (Pittsburgh)

Benchmark Filings to Justify Cable Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1995; Released: May 8, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices TCI Cablevision of Western Colorado, Inc. and TCI of Pennsylvania, Inc. (collectively "Operators") were charging for their cable programming service ("CPS") tier in the communities referenced above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393s. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operators assert that their monthly CPS prices are justified by their benchmark filings because their prices are less than or equal to their maximum permitted charges. Upon review, we have found no apparent errors that would result in Operators' actual CPS prices exceeding their maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operators in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which the Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operators. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Resort TV Cable Company, Inc. CUID No. AR0030 (Hot Springs)

Benchmark Filing to Justify Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1995; Released: May 8, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Resort TV Cable Company, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.,[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Prestige Cable CUID No. MD0288(Westminster)

Benchmark Filing to Justify Cable
Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1995; Released: May 8, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Chattahoochee Cablevision CUID No. GA0105(Newnan)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1995 **Released: May 8, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss the complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns rates that are outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges CPS rates, challenges only rates for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in the community. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMERITECH'S WAIVER OF PART 69 RULES TO ESTABLISH A PAY TELEPHONE USE FEE RATE ELEMENT

Released: May 4, 1995

On April 26, 1995, Ameritech filed a petition seeking a waiver of the Commission's rules in order to restructure charges for the use of its pay telephones to originate interstate traffic. Specifically, Ameritech requests a waiver of Sections 69.4(b), 69.105, 69.304(c), 69.406(a)(9), 69.501(d), and any other relevant portions of Part 69 of the Commission's Rules. Ameritech states that it proposes to establish a new rate element that would impose a per call charge on interexchange carriers that receive interstate traffic originating from Ameritech pay telephones. Ameritech also proposes to remove pay telephone costs from its carrier common line charge.

Interested parties should file comments on the petition by **June 5, 1995**, and reply comments by **June 26, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Ameritech's petition is available for inspection and copying in the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554. Copies also can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Cox Cable, Inc. CUID Nos.
GA0033 (City of Macon)
GA0041 (City of Warner Robins)
GA0131 (City of Bibb)

Benchmark Filings to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1995; Released: May 9, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices Cox Cable, Inc. ("Operator") was charging for its cable programming service ("CPS") tiers in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are less than the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Plum Cable TV CUID No. PA1391 (Plum Borough)

Benchmark Filing to Justify Cable
Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1995; Released: May 9, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price Plum Cable TV ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*Second Order on Reconsideration*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See* Second Order on Reconsideration, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also* Second Order on Reconsideration, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-124

In the Matter of

Amendment of Section 73.202(b), RM-8573
Table of Allotments,
FM Broadcast Stations.
(Atlantic, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 20, 1995; Released: July 28, 1995

Comment Date: September 18, 1995
Reply Comment Date: October 3, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Wireless Communications Corp. ("petitioner"), licensee of AM Station KJAN, Atlantic, Iowa, requesting the allotment of Channel 239C3 to Atlantic, as the community's first local FM service.[1] Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 239C3 at Atlantic since it could provide the community with its first local FM transmission service. Channel 239C3 can be allotted to Atlantic without the imposition of a site restriction.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Atlantic, Iowa	--	239C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 18, 1995**, and reply comments on or before **October 3, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Barry A. Friedman, Esq.
Semmes, Bowen & Semmes, Suite 900
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Petitioner filed its request as comments and counterproposal in MM Docket 94-122 which proposed the reallotment of Channel 279C from Atlantic to Glenwood, Iowa. However, since there is no technical conflict between the allotment of Channel 239C3 at Atlantic and Channel 279C at Glenwood, petitioner's proposal was not accepted as a counterproposal in that proceeding. By *Report and Order* adopted *July 14*, 1995, Channel 279C was reallotted to Glenwood and the license of Station KXKT modified accordingly.

[2] The coordinates for Channel 239C3 at Atlantic are 41-24-00 North Latitude and 95-00-54 West Longitude.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: July 28, 1995

COMMISSION SEEKS COMMENT ON ACCOUNTING TREATMENT OF PAYMENTS MADE BY THE PUERTO RICO TELEPHONE COMPANY AND THE PUERTO RICO COMMUNICATIONS CORPORATION TO THE PUERTO RICO DEPARTMENT OF TREASURY.

AAD 95-119

Comment Date: August 31, 1995
Reply Date: September 11, 1995

In a letter to the Chief, Accounting and Audits Division, Common Carrier Bureau, the Puerto Rico Telephone Company (PRTC) and Puerto Rico Communications Corporation (PRCC) requested that certain payments made to the Puerto Rico Department of Treasury be recognized as operating taxes and treated as such for purposes of calculating Universal Service Fund (USF) assistance and interstate access settlements.

PRTC and PRCC are owned by the Puerto Rico Telephone Authority (PRTA), a governmental instrumentality of the Commonwealth of Puerto Rico. PRTA is exempt from taxation by the Commonwealth but is required to make payments to the Puerto Rico Department of Treasury as "payments in lieu of taxes." The Commonwealth requires two such payments. "Payment in Lieu of Taxes I" is equivalent to the property taxes PRTA would pay to the Island's municipalities if it were not tax exempt. "Payment in Lieu of Taxes II" replaces the tax on gross income that PRTA would pay if it were a private company. Payment in Lieu of Taxes II, by Commonwealth law, shall not be less than $20 million or 4% of the gross income of PRTA, although, the Governing Board of the PRTA may approve a payment in excess of 4% of gross income if PRTA's financial condition allows.

For the 1992 tax year, PRTA made Payments in Lieu of Taxes I and Payments in Lieu of Taxes II of $22,260,639 and $101,696,702, respectively. PRTA made an initial Payment in Lieu of Taxes II of $20 million (the minimum required payment) and then made an additional Payment in Lieu of Taxes II of $81,696,702. On December 22, 1992, PRTA concluded the sale of Telefonica Larga Distancia (Puerto Rico Long Distance) to Telefonica de Espana (Telephone Company of Spain) and realized proceeds of $80 million. As a result, the Governing Board of the PRTA authorized the additional $81.7 million Payment in Lieu of Taxes II for the 1992 tax year on March 25, 1993.

In 1993, the National Exchange Carrier Association (NECA) raised questions regarding the Payment in Lieu of Taxes II. NECA stated that, for USF and interstate access settlement purposes, it would only allow the Payment in Lieu of Taxes II made prior the $81.7 million payment. Based on estimates provided by NECA, exclusion of the disputed portion of payments reduces the combined USF payments for PRTC and PRCC by $6.4 million and reduces the combined interstate access settlements by almost $16 million.

In a letter dated April 28, 1995 from Kenneth P. Moran, Chief, Accounting and Audits Division to Joe D. Edge, counsel for PRTC and PRCC, PRTC and PRCC were informed that the Commission would permit them to treat portions of the Payments in Lieu of Taxes as operating taxes for USF and interstate access settlement purposes if those amounts are calculated using tax rates no greater than those that are normally applied to non-Commonwealth owned or affiliated companies operating in Puerto Rico. PRTC and PRCC were also required to provide, for the public record, an analysis that supports the amount of payment in lieu of taxes to be considered as operating taxes for USF and interstate access settlement purposes.

Interested parties are invited to file comments on this issue. Initial comments should be filed on or before **August 31, 1995** and reply comments should be filed on or before **September 11, 1995**. All comments and reply comments shall be filed with the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments should reference AAD 95-119. Two copies of all comments should be sent to Gary Seigel, Federal Communications Commission, Accounting and Audits Division, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20036. In addition, one copy of all comments should be sent to the Commission's copy contractor, International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. All correspondence and documentation regarding this issue are available for public inspection and duplication between the hours of 9:00 a.m. and 4:00 p.m. in the Public Reference Room of the Accounting and Audits Division, located at 2000 L Street, N.W., Washington, D.C., Room 812. Copies are also available from ITS at (202) 857-3800.

For further information, contact Gary Seigel, Cost Analysis Branch, Accounting and Audits Division, (202) 418-0879.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Texas Cable TV Association,

Arkansas Cable Television Association,

Kansas CATV Association,

Missouri Cable Telecommunications Association, and PA 95-006

Cable Telecommunications Operators of Oklahoma, *et. al.*,
Complainants,

v.

Southwestern Bell Telephone Company,
Respondent

ORDER

Adopted: July 24, 1995; Released: July 28, 1995

By the Chief, Accounting and Audits Division

1. On July 21, 1995, Texas Cable TV Association, Arkansas Cable Television Association, Kansas CATV Association, Missouri Cable Telecommunications Association, Cable Telecommunications Operators of Oklahoma, *et. al.*, (collectively, Complainants) and Southwestern Bell Telephone Company (Southwestern Bell) filed a joint motion to dismiss with prejudice the subject pole attachment complaint. The Complainants and Southwestern Bell state that they have reached a full and complete settlement of all claims regarding Southwestern Bell's 1995 and 1996 pole attachment rates that Complainants had asserted in this proceeding.

2. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91 and 0.291, that the subject complaint IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Notice of Forfeiture BRH-880928UB
Issued to Dolcom Broadcasting, Inc.
For Station WUMX(FM)
Tallahassee, Florida

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1995; Released: July 28, 1995

By the Commission: Commissioner Quello concurring in the result.

I. INTRODUCTION

1. The Commission has before it a petition for reconsideration filed by the licensee of WUMX(FM)[1] requesting reduction of the $18,000 forfeiture imposed against it in *Dolcom Broadcasting, Inc.*, 7 FCC Rcd 5978 (1992) (*NOF*). The station's license was renewed for less than a full term subject to reporting conditions and a Notice of Apparent Liability (NAL) for $18,000. The licensee filed a request for elimination or reduction of the NAL.[2] That request was denied in the *NOF*. In the *NOF*, we concluded that the licensee failed to demonstrate that its violations of the Commission's Equal Employment Opportunity (EEO) Rule warranted a forfeiture lower than $18,000. *See* 47 C.F.R. Section 73.2080. The licensee again requests reduction of the forfeiture.

II. BACKGROUND

2. In our decision in the *NOF* we found that the licensee had failed to engage in adequate EEO efforts. Review of the licensee's renewal application and inquiry response revealed that it had not recruited minorities or self-assessed its EEO program until the last five months of the license term. Specifically, the licensee used general recruitment sources which were unproductive and did not reevaluate its efforts or contact additional sources until the end of the license term. Moreover, the licensee primarily relied on only one recruitment source -- a general source that provided only two minority referrals -- until the end of the term. In addition, the licensee interviewed more than one applicant for only six of its 27 hires during the term and interviewed only one minority applicant overall.[3] Further, the licensee's record-keeping was sporadic and it failed to record the number, race, or gender of interviewees in the six instances where more than one applicant was interviewed. This further hampered any attempts at self-assessment.

3. In support of its petition for reconsideration, the licensee argues, as it did in its original request for elimination or reduction of the forfeiture, that its EEO violations were less egregious than those of WSBY(AM)/WQHQ-FM, Salisbury, Maryland. *See Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989) (*Woolfson*). The licensee states that it hired a minority, while WSBY(AM)/WQHQ-FM had more hiring opportunities but hired no minorities.

4. The licensee further argues that the Commission incorrectly held that WUMX(FM)'s minority hire, in the licensee's characterization, "doesn't count," because the hire was Hispanic and not a member of the dominant minority group (Black) in the available labor force. The licensee argues that Commission policy is to further broadcasting employment opportunities for minorities and that the Commission should not emphasize only dominant minority hires. The licensee states, "[w]hile it is clear that WUMX(FM)'s EEO activities were inadequate overall, it is inimical to the public interest and Commission policy to punish WUMX(FM) because it did hire an Hispanic in an upper-level position."

5. The licensee next argues that its record was less egregious than that of WSVS(AM)/WSVS-FM, Crewe, Virginia. *See Southern Virginia Broadcasting Corporation*, 5 FCC Rcd 438 (1990). The licensee states that WSVS(AM)/WSVS-FM failed to recruit minorities or self-assess its recruitment efforts. It states that WSVS(AM)/WSVS-FM failed to contact female or minority recruitment sources for 15 full-time openings and that its only recruitment consisted of placing ads in a newspaper. Furthermore, the licensee argues that WSVS(AM)/WSVS-FM maintained no recruitment records and hired no minorities despite having a labor force that was 37% Black. WSVS(AM)/WSVS-FM's licenses were renewed for less than a full term subject to reporting conditions and an NAL for $15,000.

6. The licensee submits that its record is comparable to that of WKZQ(AM)/WKZQ-FM, Myrtle Beach, South Carolina. *See South Carolina Renewals*, 5 FCC Rcd 1704 (1990). The licensee states that the Commission found that WKZQ(AM)/WKZQ-FM failed to recruit for most openings, attracted few minority applicants, failed to record self-assessment efforts, failed to improve its EEO program despite an absence of minority applicants, and hired only one minority out of 39 full-time hires in seven years despite its location in a labor force that was 17.9% Black. The licenses of WKZQ(AM)/WKZQ-FM were renewed for less than a full term subject to reporting conditions and an NAL for $10,000.

7. The licensee argues that its record was similar to or less egregious than those of WSVS(AM)/WSVS-FM, WSBY(AM)/WQHQ-FM and WKZQ(AM)/WKZQ-FM in various ways and that the $18,000 forfeiture imposed on WUMX(FM) was inconsistent with Commission precedent

[1] The station's former call letters were WTHZ-FM.
[2] The licensee did not challenge the short-term renewal nor the imposition of reporting conditions.
[3] The minority, an Hispanic, was hired for an upper-level position. The labor force for the Tallahassee MSA was 27.6% minority (25.7% Black, 1.2% Hispanic, 0.5% Asian/Pacific Islander, and 0.2% American Indian). The licensee acquired the station in December 1985 and employed two minorities during the term -- one in 1986 and one in 1988 -- both Hispanics in upper-level positions. It employed 12 persons in 1986 and 14 in 1987 and 1988.

and thus excessive. Furthermore, the licensee argues that it improved its EEO performance after its term ended and that, although its post-term activities may not be considered when the Commission evaluates its license term performance, its EEO progress "must count for something, even belatedly." It states that it hired Blacks for upper-level positions after the end of its term and that the Commission should consider this in mitigation.

III. DISCUSSION

8. Reconsideration is appropriate where the petitioner shows either a material error or omission or raises additional facts not known or not existing until after the petitioners' last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. Section 1.106(c). After reviewing the licensee's pleading, we find that it has failed to demonstrate any basis upon which reconsideration may be granted.

9. The licensee's contention that its record is less egregious than that of WSBY(AM)/WQHQ-FM is baseless. As we stated in the *NOF*, WSBY(AM)/WQHQ-FM contacted a minority source for 14 of 33 (42.4%) openings while WUMX(FM) relied on one general source for openings until the last five months of the license term. In addition, the labor force for WUMX(FM) was 25.7% Black, compared to 19.1% Black for WSBY(AM)/WQHQ-FM. Thus, WUMX(FM) had a larger minority labor force from which to recruit. Furthermore, WUMX(FM) owned its station longer and had more time in which to implement an EEO program.

10. The licensee's further contentions that the Commission believes that WUMX(FM)'s hiring of an Hispanic "doesn't count" and that it is punishing WUMX(FM) for hiring an Hispanic are without merit. The Commission's EEO Rule and policies seek to ensure that members of all minority groups are fairly considered for employment at broadcast stations. In this case, Blacks constituted 25.7% of the Tallahassee MSA labor force and 93.1% of all minorities in that labor force. The Commission appropriately held in the *NOF* that the licensee's EEO efforts directed at Blacks were deficient. However, the Commission's decision in no way faulted the licensee for hiring an Hispanic.

11. The licensee's argument that its record is less egregious than that of WSVS(AM)/WSVS-FM is also rejected. Despite similar deficiencies in the EEO records of WUMX(FM) and WSVS(AM)/WSVS-FM, WUMX(FM) had 27 hires compared to 15 by WSVS(AM)/WSVS-FM, and had a staff of 14 in the renewal year compared to eight for WSVS(AM)/WSVS-FM. Thus, WUMX(FM) had more opportunities to recruit so as to attract minority applicants. Additionally, contrary to the licensee's statement that WSVS(AM)/WSVS-FM's "only recruitment sources were advertisements in a local newspaper", the record indicates that WSVS(AM)/WSVS-FM contacted local colleges and the NAACP, in addition to advertising vacancies in newspapers and on-air during its license term.

12. We also find that the licensee's record is more egregious than that of WKZQ(AM)/WKZQ-FM. Although the licensee correctly noted that WKZQ(AM)/WKZQ-FM hired more employees, its 39 hires were for the entire seven-year license term, whereas WUMX(FM) had 27 hiring opportunities during a three-year period. Thus, WUMX(FM) had more opportunities to recruit and attract minority applicants than did WKZQ(AM)/WKZQ-FM.

13. Finally, with respect to the licensee's argument regarding its post-term efforts, the Commission will not consider post-term EEO evidence at all if the licensee's term-time EEO record is so deficient that it, standing alone, would warrant denial of renewal or other sanctions. *Rust Communications Group, Inc.*, 73 FCC 2d 39, 53 (1979). Because we have determined that the licensee's poor recruitment efforts warrant a forfeiture, the minority hires made outside of the license term do not mitigate the station's deficient EEO record. Moreover, even upon the event of the next renewal, minority hires will constitute a limited aspect of our review of WUMX(FM)'s EEO effort.

IV. CONCLUSION

14. After considering all of the licensee's arguments, we find that our original decision imposing an $18,000 forfeiture on WUMX(FM) was correct. Accordingly, we deny the licensee's petition for reconsideration and uphold the Notice of Forfeiture imposed on WUMX(FM) in the amount of $18,000.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that the Petition for Reconsideration of the forfeiture filed by Dolcom Broadcasting, Inc. IS DENIED.

16. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Dolcom Broadcasting, Inc. FORFEIT to the United States the sum of eighteen thousand dollars ($18,000) for the wilful and repeated violation of Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission.

17. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- copies of this Memorandum Opinion and Order to all parties.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-108

In the Matter of

Petition of New York State
Public Service Commission
To Extend Rate Regulation

REPORT AND ORDER

Adopted: May 4, 1995; Released: May 19, 1995

By the Commission:

I. INTRODUCTION

1. On August 9, 1994, the New York State Public Service Commission (hereinafter "New York" or "NYPSC"), on behalf of that state, petitioned us to retain state regulatory authority over the rates for intrastate cellular service within New York State.[1] Fourteen parties filed pleadings opposing the Petition, in whole or in part; two parties filed pleadings supporting it.[2] By this action, we deny the Petition because it fails to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.

II. BACKGROUND

2. In 1993, Congress amended the Communications Act ("Act") to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio) telecommunications services.[3] Among other things, Congress: (1) established new classifications of "commercial" and "private" mobile radio services ("CMRS" and "PMRS," respectively) in order to enable similar wireless services to be regulated symmetrically in ways that promote marketplace competition;[4] (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;[5] and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act's public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.[6]

3. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate "the entry of or the rates charged" for CMRS and PMRS services, although states are permitted to regulate the "other terms and conditions" of CMRS.[7] As an exception to this general rule, Congress also provided that, if a state had "any regulation" concerning the rates for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State."[8]

4. In our proceeding to implement OBRA, we concluded that, since Congress intended generally to preempt state and local rate and entry regulation of CMRS, a state seeking to retain regulatory authority must "clear substantial hurdles" in demonstrating that continued regulation is warranted.[9] We also determined that the nature of a state's burden of proof is delineated generally by the statute itself. Specifically, we found that:[10]

> [I]n implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [*sic*] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our Federal mandate for regulatory parity.

5. We also concluded that, while a state should have discretion to submit whatever evidence it believes is persuasive, a petition to retain regulatory authority must be grounded on demonstrable evidence.[11] In that regard, we adopted Section 20.13 of our Rules as a guide to the kinds of evidence and information that we would consider to be

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[1] Petition of New York State and the New York State Public Service Commission To Extend Rate Regulation, PR Docket No. 94-108, filed Aug. 9, 1994 (hereinafter "NYPSC Petition").

[2] A list of parties that filed pleadings in this proceeding appears at Appendix A, *infra*.

[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 ("OBRA" or "Budget Act"), *codified in principal part at* 47 U.S.C. § 332.

[4] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (1994) (*CMRS Second Report and Order), reconsideration pending.*

[5] National Telecommunications and Information Administration Organization Act, § 113(b)(1).

[6] The competitive bidding methodology is to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays ...." 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of such auctions, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote "investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(C)(iii).

[7] *See* 47 U.S.C. § 332(c)(3)(A).

[8] *See* 47 U.S.C. § 332(c)(3)(B).

[9] *See CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[10] *Id.*, 9 FCC Rcd at 1421.

[11] *Id.*, 9 FCC Rcd at 1504.

pertinent and helpful to our consideration of a state petition.[12] Moreover, in addition to the evidence, information, and analysis that a state must submit, we determined that a petitioning state also is required to identify and provide a detailed description of the specific existing or proposed rules that it would continue or establish if we were to grant its petition.[13] We noted that the standards for preemption established in *Louisiana PSC* do not apply to petitions submitted under Section 332 of the Act, nor to Section 20.13 of our Rules.[14] In *Louisiana PSC* the Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising Federal jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services."[15] Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

III. DECISIONAL FRAMEWORK

6. The pleadings present two threshold procedural matters that we must address before addressing the NYPSC's Petition on its merits. First, some parties argue that the petition is fatally flawed because it requests regulatory authority only over cellular service rather than all CMRS services, thereby violating what these opponents claim is the fundamental OBRA goal of achieving symmetrical regulatory treatment of CMRS. Second, the parties take issue with each other's characterizations of the appropriate burden of proof in this proceeding.

A. *Cellular-Only Regulation*

1. Pleadings of the Parties

7. Various opponents of the Petition argue that: (1) Congress revised Section 332 of the Act to establish regulatory parity, remedy the disparate regulatory treatment of similar forms of CMRS, and create a uniform, nationwide regulatory regime; (2) by seeking to impose regulation only on cellular services, the NYPSC would impose inconsistent regulations on different CMRS providers, thereby creating precisely the asymmetrical regulatory conditions Congress sought to remedy; and (3) accordingly, the NYPSC's Petition must be rejected because it seeks to impose a type of regulatory regime expressly rejected by Congress.[16] A variant of this argument also is presented in the record. Essentially, some opponents of the Petition argue that: (1) regulatory parity is required by the statute; (2) in order to regulate *any* CMRS a state must demonstrate that market conditions warrant regulating *all* CMRS; (3) the NYPSC has not submitted a showing relating to non-cellular CMRS market conditions; and (4) accordingly, the Petition must be dismissed.[17]

8. The NYPSC and its supporters dispute these arguments. While they acknowledge that regulatory parity is a goal of OBRA, these parties argue that Congress expressly recognized that differential regulatory treatment of CMRS providers is permissible under the Act.[18] Some of these parties also claim that differential regulatory treatment of cellular and non-cellular services by a state is not only lawful, but it should be required because there is no evidence in this record or elsewhere that non-cellular CMRS providers currently possess market power, thus making regulation of their activities inappropriate.[19]

2. Discussion

9. We have determined in other proceedings that while regulatory parity is a significant policy that can yield important pro-competitive and pro-consumer benefits when appropriately applied, parity for its own sake is not required by any provision of the Act.[20] Indeed, the Act allows us to adopt a flexible regulatory scheme that treats certain CMRS in a streamlined fashion.[21] Congress recognized that market conditions might warrant differential regulatory treatment of CMRS, and it explicitly granted us the authority to forbear from applying certain provisions of the Act.[22] That Congress understood such forbearance might be exercised selectively is not in doubt. As the OBRA Conference Report states in explaining our forbearance authority:[23]

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[12] 47 C.F.R. § 20.13.

[13] *See CMRS Second Report and Order*, 9 FCC Rcd at 1505.

[14] Under *Louisiana PSC*, the Commission may preempt state regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. Louisiana Pub. Ser. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, Federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid Federal policy. *See* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); National Ass'n of Reg. Util. Comm ners v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

[15] *Louisiana PSC*, 476 U.S. at 373, *quoting* Communications Act, § 2(b), 47 U.S.C. § 152(b).

[16] *See, e.g.*, CTIA Comments at 8-10; GTE Comments at iii, 1-3, 18-26; McCaw Comments at 8-11.

[17] *See, e.g.*, RCA Reply at 1-3.

[18] *See, e.g.*, NYPSC Reply at 2, 4-6; Nextel Comments at 11; Nextel Reply at 3-5.

[19] *See, e.g.*, E.F. Johnson Comments at 4-5; AMTA Comments at 5-6; MTel Comments at 5; NCRA Comments at 3-4.

[20] *See* Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Tranferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, 9 FCC Rcd 5836, 5858 (1994) (*Craig O. McCaw*), *appeal pending on other grounds sub nom.* BellSouth Corp. v. FCC, D.C. Cir. No. 94-639, filed Sept. 23, 1994; *see generally* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 7988 (1994).

[21] *See CMRS Second Report and Order*, 9 FCC Rcd at 1463.

[22] Section 332(c)(1)(A) provides that the Commission may determine that any provision of Title II may be specified as "inapplicable to [any] service or person" otherwise treated as a common carrier. 47 U.S.C. § 332(c)(1)(A).

[23] H.R. Rep. No. 103-213, 103d Cong., 1st Sess. 491 ("Conference Report"). The Conference Report further provides that "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section." *Id.*

> The purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier.

Nothing in the record of this proceeding, or elsewhere to our knowledge, demonstrates that Congress intended to deny states similar flexibility with regard to the exercise of their CMRS regulatory authority. Thus, we are not persuaded by arguments that the NYPSC's request to regulate only cellular services is fatally incongruent with the regulatory parity concepts established in OBRA.B. *Burden of Proof*

1. Pleadings of the Parties

10. A second threshold issue addressed by the parties concerns the evidentiary standard to be applied in assessing a state's petition on the merits. The NYPSC contends that, "in a market such as the cellular market, where there are only two providers of a service and there are no currently available substitutes, actions taken by one firm may not result in a normal competitive reaction by the only other firm."[24] The NYPSC argues, in essence, that the duopolist nature of the cellular industry, *per se*, provides sufficient evidence of failed market conditions to authorize continued rate regulation by the state.

11. NCRA, too, contends that the duopolist nature of the cellular industry, of itself, warrants continued rate regulation by the state. It alleges, in support, that "since 1985, the [FCC] has classified licensed cellular carriers as dominant common carriers" and has "tentatively conclud[ed] that cellular carriers should have equal access obligations imposed upon them in accordance with [its] findings that there is not sufficient evidence to conclude that the cellular services marketplace is fully competitive."[25] Nextel, as well, argues that the duopolist character of the cellular industry compels us to grant New York's Petition. It observes that, "[u]nfortunately, the cellular industry has historically exhibited duopoly market conditions and has been a source of continuing concern for the petitioning states."[26]

12. In opposition, many commenters emphasize that the existence of a duopolist market structure and arguments that such a market is thus less than "fully competitive" are, of themselves, insufficient to sustain a petitioning state's burden of proof.[27] They variously characterize this burden of proof as "substantial"[28] or "extremely demanding"[29] or requiring a "compelling showing."[30] Several cite, in support, our statement in the *CMRS Second Report and Order* that a petitioning state must "clear substantial hurdles"[31] in order to overcome the statutory presumption of preemption, and emphasize that a state must establish "unique circumstances" within its jurisdiction in order to prevail on the merits.[32]

13. One commenter argues for a tripartite test, each element of which would be required to be satisfied before a state could continue to regulate intrastate CMRS rates: that there be substantially less competition in the particular state's market than exists at the national level; that Federal remedies be inadequate to redress the problem; and that the benefits of state regulation outweigh its costs.[33]

14. Several commenters filing pleadings in various of the state petitions dockets currently pending before us have suggested with respect to the burden of proof issue that our findings in the *CMRS Second Report and Order* on competition in the CMRS market and, in particular, the cellular market, place a greater burden on petitioning states attempting to prove failed market conditions. They note, with respect to the latter, our determination in the *CMRS Second Report and Order* that "there is some competition in the cellular marketplace."[34] Others go further and claim that state rate regulation is "presumptively inconsistent with the objectives of section 332(c)," and is effectively barred in light of our decision to forbear from requiring the filing of interstate rates for CMRS.[35]

15. In response, the NYPSC and Nextel argue that regulatory parity does not preclude intrastate rate regulation even if the Commission has forborne from tariffing, and that Congress could not have thought otherwise or it would not have provided for a state petitioning process in the face of possible Federal forbearance from rate regulation.[36]

2. Discussion

16. In order to prevail on the merits, the NYPSC must sustain its statutory burden of demonstrating that "market conditions with respect to [commercial mobile radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[37] A question arises as to what showing is necessary to sustain this burden. Although we addressed this issue in the *CMRS Second Report and Order*, we revisit it in view of the parties' debate in this record. As explained more fully below, we do not agree that our decision to forbear from regulating interstate CMRS under certain provisions of Title II makes it impossible to grant a state's petition. At the same time, we conclude that a state must do more than merely show that market conditions for cellular service[38] have been less than fully competitive in the past. In order to retain regulatory authority, a state

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[24] NYPSC Petition at 3-4 (footnotes in original omitted).

[25] NCRA Comments at 4, citing, without specific reference, *CMRS Second Report and Order*, and Notice of Proposed Rule Making and Notice of Inquiry, In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Docket No. 94-54, released July 1, 1994.

[26] Nextel Comments at 9-10.

[27] NYNEX Reply at 3; McCaw Comments at 5; CCI Comments at 16-18; CTIA Comments at 7-10; GTE Reply at 11; RTC Comments at 4-6; RTC Reply at 2; PageNet Comments at 3.

[28] CTIA Comments at 5-7.

[29] McCaw Comments at 4.

[30] AMTA Comments at 5.

[31] *CMRS Second Report and Order*, 9 FCC Rcd at 1421.

[32] *See, e.g.*, PCIA Comments at 5.

[33] McCaw Comments at 11-15.

[34] *See CMRS Second Report and Order*, 9 FCC Rcd at 1472.

[35] McCaw Comments at 6; CCI Comments at 11-12; CTIA Comments at 2, 4, 7-9; AMTA Comments at 4-5; Nextel Comments at 3-4 (noting the cross-state nature of mobile services mentioned in the legislative history).

[36] NYPSC Reply at 4-11; Nextel Reply at 13-16.

[37] 47 U.S.C. § 332(c)(3).

[38] Although the provisions of Section 332(c)(3) of the Act

must show that, given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory.

17. Since the Budget Act does not explicitly construe or elaborate on the phrase "market conditions ... fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory," we look to the "design of the statute as a whole and its object and policy" to give that phrase meaning.[39] We begin that task by reference to other Sections of the Communications Act, such as Section 201, which also speak of just and reasonable rates.[40] We have generally described the measure of reasonableness under these Sections in terms of rates that reflect or emulate competitive market operations.[41] The more formal description, however, is whether rates fall within a "zone of reasonableness" that is bounded at one end by the "investor interest in maintaining financial integrity and access to capital markets" and at the other by the "consumer interest in being charged non-exploitative rates."[42] Regardless of how the test is characterized, it is well established that determinations whether rates fall within this zone are not dictated by reference to carriers' costs and earnings,[43] but may take account of non-cost considerations such as whether rates further the public interest by tending to increase the supply of the item being produced and sold.[44] These principles define basic components of a state's demonstration under Section 332. Specifically, a state must show that market conditions fail to produce rates that fall within a "zone of reasonableness," which is defined by reference to investor and consumer interests viewed in the context of relevant public policy considerations.

18. We also consider the meaning of the relevant language in the statute in the context of the overarching command of Section 332(c)(3), which is: "no State ... shall have any authority to regulate" CMRS rates.[45] As we concluded in the *CMRS Second Report and Order*, that provision, as well as the title of Section 332(c)(3) ("State Preemption"), express an unambiguous congressional intent to foreclose state regulation in the first instance.[46] Moreover, OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation,[47] and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.[48]

19. Unlike some of the opponents of the NYPSC Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied. Tellingly, it did so in the context of a broad statutory framework with several other principal components. Under the OBRA: (1) substantial amounts of spectrum reserved for Federal government use are to be identified and transferred to commercial and public safety uses;[49] (2) this and other available spectrum, if allocated to commercial telecommunications uses, are to be licensed "rapidly" through the use of competitive bidding systems to promote the development and deployment of new technologies, products, and services, with the goal of stimulating economic opportunity and competition;[50] and (3) in contemplation of the deployment of spectrum to commercial wireless services, and to promote regulatory parity, Congress also articulated definitional criteria for determining common carrier status consistently so success in the marketplace will not be determined by regulatory strategies but by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs.[51]

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apply to rate or entry regulation in the case of any commercial mobile radio service provider, the NYPSC Petition is oriented to the provision of cellular service.

[39] *See* Crandon v. United States, 494 U.S. 152, 157 (1990); McCarthy v. Bronson, 500 U.S. 136, 139 (1991).

[40] *See* 47 U.S.C. § 201; *see also* 47 U.S.C. §§ 623 (b)-(c) (provisions governing reasonableness of cable television rates).

[41] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 2886, 2889-2900 (1989); *see also* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 & 93-215, FCC 94-286, released Nov. 18, 1994, at paras. 24, 34-37, 64-79.

[42] *See, e.g.*, FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979); AT&T v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988); *see also* FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944); Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

[43] *See* FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979) (the zone of reasonableness is not defined by a "rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier's] rates on its own costs.") (citation omitted); *see also* Permian Basin Area Rate Cases, 390 U.S. 747, 769, 797-98, 800-05, *reh'g denied*, Bass v. FPC, 392 U.S. 917 (1968) (upholding ratemaking based upon area-wide average costs).

[44] *See, e.g.*, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974), in which the Supreme Court upheld a Federal Power Commission incentive plan that permitted an increase in rates in order to encourage increased production. In doing so, the Court emphasized that it was permissible for the agency to consider non-cost factors:

> Mobil's argument assumes that there is only one just and reasonable rate possible for each vintage of gas, and that this rate must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here. The Commission explicitly based its additional "non-cost" incentives on the evidence of a need for increased supplies.

Id. at 316. *See also* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502-03 (D.C. Cir), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates); Public Service Comm'n of New York v. FERC, 589 F.2d 542, 559 (D.C. Cir. 1978) (stating that agencies have authority to adopt incentive-based regulatory approaches in order to serve the public interest).

[45] 47 U.S.C. § 332(c)(3).

[46] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[47] 47 U.S.C. § 332(c)(1)(A).

[48] 47 U.S.C. § 332(c)(1)(C).

[49] OBRA § 6001, amending the National Telecommunications and Information Administration Organization Act.

[50] *See* OBRA § 6002(a), amending Section 309 of the Communications Act.

[51] *See* 47 U.S.C. § 332(d)(1); *CMRS Second Report and Order*, 9 FCC Rcd at 1420.

20. Viewing all three components together, the statutory plan is clear. Congress envisioned an economically vibrant and competitive market for CMRS services. It understood that such a market was still evolving,[52] and it provided the resources (*e.g.*, additional spectrum) and administrative authority (*e.g.*, licensing through competitive bidding) to accelerate that process. Finally, Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.[53] Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.[54]

21. We emphasize the important impact on our decisionmaking of these fundamental elements of the OBRA statutory framework, which have no counterparts in other sections of the Communications Act. They are devoted exclusively to wireless telecommunications services, and to CMRS in particular. Our analysis of "market conditions" in the context of Section 332(c)(3) necessarily is governed by that framework.

22. Section 332(c)(3) must be interpreted in this context; it is an exception to the general prohibition against state regulation. We conclude that New York or any other state, should not be allowed to continue regulating CMRS overall, or cellular service in particular, merely by demonstrating that the market for cellular service has been less than fully competitive. Such a standard would effectively allow an exception permitting regulation to nullify a general prohibition against it, because it is commonly understood that such conditions have in the past adhered in the cellular marketplace. On numerous occasions since the Commission established the two-carrier cellular market structure in 1982, we have acknowledged that such a structure provided less than optimal competitive opportunities.[55] Other Federal agencies have taken similar positions.[56] One year prior to adoption of the Budget Act, the General Accounting Office (GAO) -- the investigatory arm of Congress -- examined the industry and reported that "[w]hile GAO found no evidence of anticompetitive or collusive behavior in the course of its work, the two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets."[57] It strains credulity to assert that Congress was blind to these conditions in 1993 when it broadly prohibited state regulation of CMRS.[58] Thus, we reject a reading of the statute that allows continued rate regulation merely on a showing of duopoly conditions, because it is not plausible to conclude that Congress adopted a self-defeating statutory scheme.[59]

23. It also is worth noting that this Agency's recognition of imperfect cellular market conditions has been matched by our commitment to rectify those conditions as quickly as possible by strengthening and expanding cellular competition rather than by resorting to heavy-handed regulation.[60] For example, we have attempted to heighten cellular competition at the retail level by prohibiting restrictions on the resale of cellular services, except in narrow circumstances where we determined that restrictions intensify competition between the two licensees in each local mar-

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[52] The Commission's effort to establish new personal communications services (PCS) was initiated in 1989, four years prior to enactment of OBRA, in response to several petitions for rulemaking. During that period we established a formal proceeding to consider PCS issues and adopted major policy decisions that resulted in an allocation to PCS of far more spectrum than is allocated to cellular service. *See* Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, 6 FCC Rcd 6601 (1991); Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676 (1992); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992); Second Report and Order, 8 FCC Rcd 7700 (1993); Memorandum Opinion and Order, 9 FCC Rcd 4957(1994); Third Memorandum Opinion and Order, 9 FCC Rcd 6908 (1994). We also made recommendations and participated, on behalf of the United States Government, in international allocations decision making fora that recognized and permitted the use of such spectrum for PCS and other emerging technologies on a global scale. *See* Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1992). Congress was well aware of such activities, as witnessed by the fact that the Budget Act commanded us to begin granting licenses for such new services no later than May 1994. *See* OBRA § 6002(d)(2)(B).

[53] *See CMRS Second Report and Order*, 9 FCC Rcd at 1421; *see also* 47 U.S.C. §§ 309(j)(4)(B), 309(j)(4)(c)(iii); OBRA Conference Report at 483, 492-93.

[54] *Id.*

[55] *See, e.g.*, Cellular Communications Systems, 86 FCC 2d 469, 474 (1981), *modified on reconsideration*, 89 FCC 2d 58, 71-74 (1982), *modified on further reconsideration*, 90 FCC 2d 571 (1982); Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1725 & n.67 (1991) (*Cellular Resale Order*).

[56] *See* Reply Comments of the United States Department of Justice, CC Docket No. 91-34, filed June 19, 1991, at 4-5 ("[T]here is insufficient evidence to warrant the conclusion that the cellular service market is in fact workably competitive. In each service area there is still a duopoly[.]"); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, CC Docket No. 91-34, filed July 31, 1991, at 7 ("[T]he staff disagrees with the tentative conclusion that cellular service is produced in a competitively structured market."), 10-12.

[57] United States General Accounting Office, "Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry," GAO/RCED-92-220 (July 1992) (GAO Report).

[58] *Cf.* Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) (Court generally presumes Congress is knowledgeable about existing law pertinent to legislation it enacts); *accord* Miles v. Apex Marine Corporation, 489 U.S. 19 (1990); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Minneapolis & St. Louis Railway Co. v. United States, 361 U.S. 173 (1959).

[59] *Cf.* McNary v. Haitian Refugee Center, 498 U.S. 479 (1991) (Court generally presumes Congress legislates with knowledge of basic rules of statutory construction).

[60] *See, e.g.*, GAO Report at 3 (The "FCC is relying on the introduction of advanced personal communications services to bring competition to the cellular telephone marketplace."). The Commission policy of avoiding heavy-handed regulation of the cellular market while it was developing also has been determined reasonable in court. *See* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1112 (D.C. Cir 1992) (petitions for review of FCC order declining to initiate rate regulation of cellular denied because "the FCC could reasonably conclude, in light of the novelty of the service and the speed of technological change, to wait and see how the market evolved...").

ket.[61] We also have retooled policies initially tailored to promote competition in the wireline market upon determining that they were unlikely to have that effect in the unique setting of wireless telecommunications.[62] Most especially, we have chosen to address the structural infirmity of the cellular market by vastly expanding the amount of spectrum available for two-way wireless voice communications and other innovative wireless services and technologies.

24. The framework of our CMRS regulatory policy -- moderate regulation, symmetrical regulation of all services as appropriate, and a preference for curing market imperfections by lowering entry barriers in order to encourage competition rather than by regulating existing licensees -- aligns closely with the principal building blocks of OBRA. Indeed, that statute is in a very real sense a validation of our approach.[63] As the legislative history of OBRA makes plain, Congress intended those building blocks to establish a *national* regulatory policy for CMRS,[64] not a policy that is balkanized state-by-state.

25. That intention informs our review of petitions filed by states under Section 332(c)(3). Put simply, Congress intended such petitions to be evaluated in light of a general preference for allowing the policies embodied in OBRA to have an opportunity to work. With regard to the statutory prohibition on state regulation in Section 332(c)(3) in particular, the legislative history leaves no room for doubt on this point by providing that:[65] [i]n reviewing [state] petitions . . . the Commission also should be mindful of the Committee's desire to give the policies embodie[d] in section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.

26. In deference to the states, with whom we have and will continue to share telecommunications jurisdiction under the dual regulatory system of the Communications Act, we have not presumed to establish a rigid blueprint for the demonstration required under Section 332(c)(3). Moreover, unlike many opponents of the petition before us, we do not agree that a state's burden is so great that it is impossible to carry. For example, our decision to forbear from most CMRS regulation is not dispositive of the question whether states may initiate or continue rate regulation of such services. We think it unlikely that Congress would have established two separate statutory procedures -- one to govern our forbearance, and another to govern states' petitions[66] -- if it intended our decisions under the former procedure to control automatically the outcomes under both of them. Instead, we conclude that the exemption in Section 332(c)(3) is designed to permit a state to demonstrate that market conditions in that state warrant a departure from national OBRA policies.

27. Such a demonstration begins but does not end with a showing of less than fully competitive market conditions. Almost all markets are imperfectly competitive,[67] and such conditions can produce good results for consumers.[68] In particular, as noted previously, Congress was aware of the duopoly cellular structure when it generally proscribed state regulation of CMRS. If a showing of less than perfect competition in the past could justify granting a state petition, regulation might be imposed in a great many circumstances. Nothing on this record convinces us that Congress intended that result.

28. Instead, we believe that a state must establish the existence of an environment of unjust and unreasonable, or unreasonably discriminatory, rates, given the dynamic and evolving structure in which CMRS is provided. When we implemented the Section 332(c)(3) state petition process in the *CMRS Second Report and Order*, we adopted a rule designed to elicit the information needed to make such a showing. Such information permits us to perform a Structure-Conduct-Performance ("SCP") analysis,[69] which is a standard paradigm of modern industrial organization analysis.[70] This paradigm, as applied to the mobile telecommunications industry, holds that market structure is impacted by basic conditions such as the number of licenses issued by the Commission and the state of technology. Conduct, in turn, depends on the structure of the market, *e.g.*, on the

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[61] *See Cellular Resale Order*, 7 FCC Rcd at 4006-07. We have recently initiated a review of our resale policies to tailor them to conditions in an emerging wireless telecommunications market that has been expanded to include PCS. *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408 (1994) (*Notice of Proposed Rulemaking and Notice of Inquiry*), Second Notice of Proposed Rulemaking, FCC 95-149, released Apr. 20, 1995.

[62] Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992).

[63] If Congress had concluded our approach was deficient, or that we should travel in a different policy direction, it is reasonable to conclude that it would have directed us accordingly.

[64] See Conference Report at 480-81, incorporating the findings set forth in the Senate Amendment, including the following:

> [B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.

[65] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261-62.

[66] *See* 47 U.S.C. §§ 332(c)(1) (forbearance) and 332(c)(3) (state petitions).

[67] In general, perfect competition can exist only where goods are homogeneous, and all buyers and sellers have full information and accept price as given (*i.e.*, they do not try to influence price). There are also certain necessary conditions regarding cost of production. *See* D. Carlton & J. Perloff, Modern Industrial Organization 87 (1995). Under perfect competition, price equals marginal cost, which is the incremental cost of producing the last unit of a good. Such conditions are theoretical constructs.

[68] *See, e.g.*, W. Baumol, J. Panzar & R. Willig, Contestable "Markets and the Theory of Industry Structure 15-46 (1982).

[69] Section 20.13(a)(1) requires states to include "demonstrative evidence" establishing failed market conditions. *See* 47 C.F.R. § 20.13(a)(1). Section 20.13(a)(2) provides an extensive, detailed list of the types of information that states are encouraged to supply in order to meet this evidentiary burden. *See* 47 C.F.R. § 20.13(a)(2)(vi).

[70] *See, e.g.*, F. Scherer & D. Ross, Industrial Market Structure and Economic Performance, 4-7 (3d ed. 1990) ("Scherer and Ross"); D. Carlton & J. Perloff, Modern Industrial Organization, chs. 1, 9 (2d ed. 1994); J. Tirole, The Theory of Industrial Organization 1-3 (1988).

number of competitors, the cost structure, and the degree of integration with other wireless providers. Performance, in turn, depends on the conduct of providers and other industry participants with regard to activities such as pricing, inter-firm coordination, and technical standards. Such an analysis permits an evaluation of the degree of rivalry within a particular industry structure and allows us to determine whether and how consumer interests are being served by such activity.

29. Nothing in our rule governing the state petition process suggests that merely showing the existence of a cellular duopoly structure is enough to support a petition. In the first instance, the rule signals our insistence that a petition must be based on demonstrable evidence of anticompetitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates. For example, in order to determine whether an anticompetitive environment presently exists within a state, we requested that a petitioning state produce "specific allegations of fact," to be supported by a sworn affidavit of an individual with personal knowledge thereof, regarding "anticompetitive or discriminatory practices or behavior by commercial mobile radio service providers."[71] We also requested "[e]vidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates ... [or a] pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces," and we indicated that we would consider such evidence "especially probative."[72]

30. In order to assess present market conditions so as to predict the future effectiveness of market forces within the state, we requested information on the number and type of CMRS providers in the state as well as their respective customers,[73] and "an assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state."[74] We also requested information and complaint statistics revealing customer satisfaction with CMRS providers within the state.[75] In addition to this information, and as a further aid in projecting CMRS growth rates and other trends within the state, we also requested information on "trends" in each commercial radio provider's rates and customer base[76] and on "opportunities for new providers to enter into the provision of competing services" as well as "an analysis of any barriers to such entry."[77] In short, although states have the discretion to adduce such evidence in support of continued rate regulation as they see fit,[78] the comprehensive list of anticipated documentation in Section 20.13 gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions.

31. The purposes to which such evidence must be put also are straightforward. For example, with regard to industry structure, while a state seeking to regulate two-way mobile voice services may draw attention to the cellular duopoly, it is incumbent on that state to consider factors that have a direct and substantial impact on that structure. In particular, in evaluating a cellular-oriented petition, we will look with disfavor on any petition that fails to consider the immediate and near-term impact of PCS. Given the general statutory purpose of facilitating PCS-type services, it would be difficult to ignore or downplay the importance of fundamental structural changes when considering Section 332(c) petitions.

32. While PCS is not yet available to the public, it is anaccepted antitrust principle that a firm may be considered in competitive analysis if it could enter the market in question.[79] Under the case law potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors,[80] and there is little doubt that PCS licensees will enter the market for CMRS in competition with cellular providers within this timeframe. We recently concluded an auction designed to license rapidly two additional competitive providers of wireless two-way voice and data communications in every local market in the country. As shown in the table below, the winning bidders in markets encompassing New York have committed to pay substantial sums for the right to operate wireless systems in that state. Having done so, it is reasonable to conclude they

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71 47 C.F.R. § 20.13(a)(2)(vi).
72 47 C.F.R. § 20.13(a)(2)(vii).
73 47 C.F.R. § 20.13(a)(2)(i) and (ii).
74 47 C.F.R. § 20.13(a)(2)(iv).
75 47 C.F.R. § 20.13(a)(2)(viii).
76 47 C.F.R. § 20.13(a)(2)(ii) and (iii).
77 47 C.F.R. § 20.13(a)(2)(v).
78 *CMRS Second Report and Order*, 9 FCC Rcd at 1504.
79 *See, e.g.*, McCaw Personal Communications, Inc. v. Pacific Telesis Group, 645 F. Supp. 1166, 1174 (N.D. Cal. 1986) ("the existence of low barriers to entry may rebut a prima facie showing of illegality, even where the combined market shares of the merged firms is quite high"), *citing* United States v. Waste Management, Inc., 743 F.2d 976, 982- 83 (2d Cir. 1984). *See also* American Bar Association, I Antitrust Law Developments (Third) 307-11 (1992) and cases cited therein.
80 *See* FTC v. Owens-Illinois, Inc., 681 F. Supp. 27, 37 & n.23 (D.D.C. 1988), *vacated on other grounds*, 850 F.2d 694 (D.C. Cir. 1988) (concerning "the extensive present and future intermaterial competition in the glass and other packaging industries," "[a]n important, but undisputed, assumption of the economic analysis in this case is that the relevant time frame within which to view elasticity is approximately two years. In other words, conversions by purchasers between types of containers must be feasible within this time frame for demand and supply to be considered elastic"); Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992)(*Merger Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) at 20,573-10 (Entry Analysis, Timeliness of Entry: "In order to deter or counteract the competitive effects of concern, entrants must quickly achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact") (footnote omitted). The *Merger Guidelines* consider firms to be present competitors if, under certain conditions, they could shift production to a new product within only one year. *Id.* at 20,573-4.

will deploy the facilities necessary to become operational as quickly as possible so as to begin recouping their investment. [81]

33. The nature of this impending competitive entry bears emphasis. Unlike the typical "ease of entry" case, where entry by new competitors is hypothetical or may occur only at an industry's margin, PCS activity is undeniably real. It is not something that "may" occur, or that will occur only sporadically. It *is* happening, and it is happening on a nationwide scale. As the recently-completed auction demonstrates, some of this entry is being mounted by large, well-financed entities with long experience and success in the telecommunications business. That field of competitors will be strengthened further upon completion of additional spectrum auctions in the near future. Available evidence indicates that cellular companies, faced with the near-term entry of PCS, have reacted by preparing for impending competition, *i.e.*, by lowering prices and adopting new technologies. For example, there are reports that observable declines in cellular prices are attributable in part to cellular carriers' knowledge that reasonably soon they will face new competition from PCS licensees.[82] The advent of PCS also appears unambiguously to be having an impact on the present marketplace; it is repeatedly cited as a precipitating factor in major mergers and joint ventures in the wireless industry.[83] Thus, the available evidence indicates strongly that such entry is not speculative. Instead, all evidence suggests that it is empirically real and in the very near term will be substantialand pervasive. This warrants our consideration when evaluating a state petition to regulate rates under Section 332(c)(3).

34. Evidence of industry conduct and performance is also relevant. For example, a state might demonstrate specific instances of collusive behavior on the part of licensees. A state also might demonstrate that the statutory purposes of OBRA were not coming to fruition in that state, or were not likely to do so. We would find highly relevant any evidence that demand for CMRS services in general and cellular service in particular is too low to promote market entry by the number of licensees needed to ensure that facilities-based competition will occur at a level adequate to warrant reliance on market forces, rather than rate regulation, as a means of protecting consumer interests.

35. Moreover, a very strong indication that industry conduct and performance are failing to serve consumer interests adequately would be evidence of a lack of investment on the part of licensees in CMRS facilities, or a failure by licensees to deploy adequately new facilities, technologies, and services. Such a showing might support a conclusion that licensees were restricting the output of a service solely to increase its price, and such activity might warrant an appropriate regulatory response. Of course, a successful showing of this nature requires more than evidence that a licensee is earning economic rents (*i.e.*, pricing above cost). It is readily conceivable that economic rents earned in the cellular industry also might advance important public policies, such as if they were applied in furtherance of the statutory goal of promoting investment in the cellular infrastructure. In that event, the rates underlying such profits would have been paid by those who ultimately benefit from reinvestment in cellular facilities. Specifically, as a cellular carrier adds large numbers of customers, it must expand capacity so that the quality of service to existing and new customers is not degraded. Thus, an analysis of economic performance must place great weight on reinvestment of profits in this high-growth industry, for, without such reinvestment, consumers might receive less value for their money. In short, the significance of economic rents under our Section 332(c)(3) analysis is found not simply in their existence in the first instance but in their subsequent application.

36. Finally, we note that SCP evidence typically may be segregated into two categories: static factors and dynamic factors.[84] For example, prices or rates of return in a given year are static factors. Growth and investment are dynamic factors. In addition, a dynamic analysis views price and other static factors at a given point in time in their relationship to static factors such as price in the future.[85] Thus, a rate of return that looks high today may be fair and reasonable when looked at in terms of its impact on future prices.[86] Furthermore, static factors are, as the name implies, static, or even temporary, whereas the long-term impact of dynamic factors is more important because their effects are cumulative and more permanent. Thus, we believe that evidence concerning dynamic factors is a more persuasive market indicator than evidence concerning static factors. Given the rapidly changing nature of the market in which wireless services are provided and the statutory pur-

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[81] This figure represents the amount to be paid by the pioneer's preference licencee, as required by Section 309(j)(13) of the Communications Act. *See* American Personal Communications, Washington-Baltimore MTA #10, Frequency Block A; Cox Cable Communicatons, Inc., Los Angeles-San Diego MTA #2, Frequency Block A; Omnipoint Communications, Inc. New York MTA #1, Frequency Block A; For Initial Authorizations in the Broadband Personal Communications Service, Memorandum Opinion and Order, 10 FCC Rcd 1101 (1994).

[82] *See, e.g.*, Comm. Daily, Apr. 24, 1995, "*Cellular Industry Eyes Further Cuts, Adjustments to Challenge PCS*" (report on independent researcher's projection of cellular service rate cuts "up to 40%" over next two years); Comm. Daily, Telephony Section, Mar. 9, 1995 (NYNEX cellular company "said it will begin offering PCS-type services in metro N.Y. under Geographic Option Plan trademark, giving customers greater flexibility in setting rates and using service. Monthly charge is $24.99, with additional min. at 29 cents in home county, 99 cents elsewhere"); M. Mills, *Wireless: The Next Generation*, Wash. Post, Feb. 20, 1995, Washington Business Section at 1, 14-15; M. Thyfault, *Bell Companies Get Personal -- Bell Atlantic, NYNEX Plan to Merge Their Mobile and Cellular Divisions as PCS Players Continue Consolidation*, Information Week, Communications Section at 33, July 18, 1994 (Bell Atlantic announces a low-priced, low-range offering on its Annapolis, Philadelphia, and Pittsburgh cellular systems, intended to resemble PCS offerings).

[83] *See, e.g.*, Applications of Bell Atlantic Corp. and NYNEX Corp. for Transfer of Cellular Radio Licenses to Cellco Partnership, Report No. CL-95-17, File Nos. 00762-CL-AL-1-95 *et al.*, filed Oct. 18, 1994, Exhibit 2 ("Description of Transaction and Public Interest Statement") at 12, 14; *Id.*, Attachment D, Affidavit of M. Lowenstein at para. 18; Motorola, Inc., Order, DA 95-890, released Apr. 27, 1995, at para. 17 (Wireless Telecommunications Bureau), *petition for reconsideration pending; Craig O. McCaw*, 9 FCC Rcd at 5862-63.

[84] *See, e.g.*, J. Tirole, The Theory of Industrial Organization 209-70 (1988).

[85] *Id.* at 239-70.

[86] In particular, consumers may be better off facing somewhat higher prices today in exchange for high levels of investment by existing competitors.

BROADBAND PCS AUCTION RESULTS

New York					
MTA #	**Freq. Blk.**	**State**	**Market**	**Winning Bidder**	**Winning Bid**
M001	A	New York	New York	Omnipoint Corporation	$347,518,309[81]
M001	B	New York	New York	WirelessCo, L.P.	$442,712,000
M035	A	New York	Buffalo-Rochester	WirelessCo, L.P.	$18,893,000
M035	B	New York	Buffalo-Rochester	AT&T Wireless PCS Inc.	$19,864,000

poses of OBRA, we conclude that evidence of where a market is going is more relevant than evidence of where it has been.

37. No single factor, standing alone, necessarily would tip the balance for or against a particular state petition. The statute allows the states flexibility to make their showings in the best manner they see fit, and it is conceivable that we might find a showing based primarily on one factor to be persuasive. Those demonstrations that are tied most closely to the statutory scheme are, of course, the most determinative. Our decisions in this proceeding and similar proceedings are based on the totality of the evidence.

IV. NEW YORK PETITION

A. *Summary of NYPSC Request*

38. The NYPSC requests that it be authorized to continue to regulate the rates of cellular telephone companies and resellers of cellular telephone service.[87] It states that it is not proposing any new regulations and that its request is limited to enforcing those regulations presently in place for cellular carriers.[88] The NYPSC advises that it presently lacks statutory authority to regulate one-way paging or two-way mobile telephone services other than cellular services and that it will seek Commission authority to regulate the rates for such services only if, and at such time, it is accorded that regulatory authority by state law.[89]

39. The NYPSC arguesRGUES that competition in the New York State (or any) cellular market is imperfect because of the duopolist nature of the cellular industry, but contends that the industry's anticompetitive impulses have been held in check in New York by the NYPSC's regulatory "oversight."[90] It proffers information on prices, return on equity, and market share as evidence of a potential lack of competition in the New York cellular market and attributes the "nondispositive," "mixed record" it has compiled with respect to price levels and market structure to the ameliorative effects of the present regulation that it seeks to continue. The NYPSC argues that "to wait until New York can establish that there are major problems before allowing it to regulate cellular carriers is not the solution[91] and that "regulatory oversight [must] remain in place in order to ensure that the affordability of cellular service continues to improve."[92]

B. *Regulation for Which Continued Authority Is Sought*

40. The NYPSC emphasizes that cellular providers are "lightly regulated" in New York.[93] Under this regulatory scheme the NYPSC permits carriers to file tariffs that establish a range of rates (minimum and maximum rates), effective not less than 30 days from the date of filing. Rate changes within this range can be made with as little as one day's notice to customers and the NYPSC. The NYPSC states that "carrier rates are based on what each carrier believes the market will bear"[94] and contends that this regulatory scheme allows carriers "wide latitude in meeting their initial rates and making changes to those rates in response to competitive forces and customer demand."[95]

41. The NYPSC does not review rate ranges proposed by cellular carriers unless and until a complaint is lodged. Staff review of individual rate changes within the proposed range is limited to ensuring that "carriers are not seeking to engage in discriminatory practices."[96] An evidentiary hearing is required only if a carrier proposes to increase its rates above the maximum set forth in its tariff and the change would increase its gross operating revenues by more than 2.5 percent or $100,000, whichever is greater. Such hearings must be completed in 11 months, and the NYPSC explains that very few are held because it encourages cellular carriers to file rates with "wide flexible rate minimum to maximum ranges."[97]

42. The NYPSC emphasizes that it does not require cellular carriers to file cost information to support tariff rate changes and that it does not set rates based on carrier costs or return on equity.[98] The NYPSC states that its "simplified regulatory approach is aimed at protecting consumers from anticompetitive and discriminatory practices, should the need arise."[99] The NYPSC has provided a copy of its regulations in support of its contentions and in compliance with Section 20.13(a)(4) of our Rules.[100] Section 630.14 of the NYPSC's regulations addresses maximum and minimum rates.[101]

C. *Description of New York State Market*

43. According to the NYPSC, New York State is divided into 17 Cellular Geographic Service Areas (CGSA), 11 of which encompass Metropolitan and Surrounding Areas (MSAs) and 6 of which cover rural areas (RSAs).[102] Each CGSA, except for one RSA, is served by two cellular carriers. This has been the case in each of the MSAs for the past nine years. All but one of the RSAs have been served by two cellular carriers for at least the last three years. The New York City MSA generates 73 percent of total cellular revenues in the state. Another 20 percent are divided among four Upstate MSAs. The remaining seven percent is divided among the other 12 CGSAs. The NYPSC states that, "[a]s of June 1994, there were approximately 32 resellers in New York."[103]

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87 NYPSC Petition at 2.
88 NYPSC Reply at 16.
89 *Id.* at 1 n.1.
90 NYPSC Petition at 2.
91 *Id.* at 1212.
92 *Id.* at 8.
93 *Id.* at 6-7.
94 NYPSC Reply at 19.
95 *Id.* at 6.
96 *Id.*
97 *Id.*
98 NYPSC Reply at 17.
99 *Id.*
100 47 C.F.R. § 20.13(a)(4). The NYPSC provided copies of its regulations as Exhibit IV to its Reply. In consequence, challenges by several commenters based on the NYPSC's earlier failure to provide a copy of its regulations no longer have merit. *See* McCaw Comments at 17 n.43; PCIA Comments at 14; Vanguard Comments at 4; NYNEX Comments at 5.
101 *See* NYPSC Reply at Exhibit IV.
102 NYPSC Petition at 5-6.
103 Presumably, the NYPSC is referring here to the New York City MSA; it does not refute CCI's statement to this effect elsewhere in the record. *See* CCI Comments at 18. The NYPSC does allege with respect to resellers, however, that they are "wholly dependent upon either of the two underlying carriers

V. CASE ON THE MERITS

A. *General Positions of the Parties*

44. Both NCRA and Nextel[104] vigorously support the NYPSC's Petition to continue intrastate rate regulation of cellular carriers. AMTA, PCIA, E.F. Johnson, and MTel are also supportive of the Petition to the extent that it does not seek to extend rate regulation to paging services or other commercial mobile services. These commenters, and Nextel, deny that disparate rate treatment for cellular and other commercial mobile services controverts the statutory objective of regulatory parity among providers of comparable mobile services.[105]

45. The following commenters oppose the Petition: CCI, CTIA, RTC, SWB, NYNEX, McCaw, GTE, RCA, and Vanguard. Of these, CTIA, RTC, McCaw, GTE, and RCA argue that singling out cellular services for rate regulation is prohibited by Section 332 of the Act.[106] PageNet, PageMart, and E.F. Johnson oppose the Petition only with respect to paging services, arguing that the NYPSC has failed to sustain its burden of proof with respect to those services.

46. The NYPSC argues, in essence, that the duopolist nature of the cellular industry, *per se*, provides sufficient evidence of failed market conditions to authorize continued rate regulation by the state. It contends that:[107]

> [e]ffective competition requires strong mutual pressure on firms to perform well (by minimizing costs, by holding prices down tothese costs, by providing good service quality and by innovating rapidly) in order to survive. However, in a market such as the cellular market, where there are only two providers of a service and there are no currently available substitutes, actions taken by one firm may not result in a normal competitive reaction by the only other firm.
>
> With but one real competitor in each market area, a cellular provider has less incentive to innovate or price competitively than it would in a multi-vendor market. Therefore, absent a fully competitive market, continued light rate regulation is required to ensure that rates do not become discriminatory, unjust or unreasonable.

47. In support, NCRA and Nextel argue that facilities-based cellular providers have a "transmission bottleneck" that enables them to limit competition and "exact supracompetitive profits from the public."[108] NCRA contends that the duopolist nature of the cellular industry warrants continued state rate regulation and alleges, in support, that "since 1985, the [FCC] has classified licensed cellular carriers as dominant common carriers" and has[109]

> tentatively conclud[ed] that cellular carriers should have equal access obligations imposed upon them in accordance with the [FCC's] findings that there is not sufficient evidence to conclude that the cellular services marketplace is fully competitive.

NCRA has listed in an appendix to its comments the reports of eight Federal agencies which it alleges have concluded that the cellular industry is anticompetitive.[110]

48. Nextel, too, argues that the duopolist character of the cellular industry compels us to grant New York's Petition:[111] The future CMRS marketplace is only beginning to develop. It is anticipated, for instance, that approximately six alternative CMRS providers, including PCS, cellular, and wide area SMR, ultimately will provide comparable service in any given geographic area. If this were presently the case, there would be little doubt that state regulation of all classes of CMRS would be preempted. However, the current CMRS market is far more limited. Accordingly, the Commission is forced to make its preemption determinations based only on its analysis of a single class of CMRS -- cellular service. Unfortunately, the cellular industry has historically exhibited duopoly market conditions and has been a source of continuing concern for the petitioning states.

49. On the issue of substitutability and consequent competition from other types of commercial mobile services, Nextel contends that there are presently no "voice-grade" mobile services offering viable competition to cellular service. Nextel points out that:[112]

> PCS spectrum has not yet been assigned and will not pose a competitive threat to cellular operators until proposed systems are constructed and placed into operation. Even in the most commercially attractive

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in any market area" and that "[t]he presence of multiple resellers does not itself indicate effective competition." NYPSC Petition at 5 n.2 (emphasis in original omitted).

[104] However, Nextel opposes state rate regulation of "emerging non-dominant CMRS carriers, including ESMR and PCS providers." Nextel Comments at 12.

[105] Nextel Reply at 3-7; AMTA Comments at 6-7; PCIA Comments at 1; E.F. Johnson Comments at 4; MTel Comments at 6; MTel Reply at 5, *citing CMRS Third Report and Order*, 9 FCC Rcd at 8009, 8014. MTel argues that the test for technical and operational rules, in terms of uniformity, is different from that applicable to forbearance.

[106] RTC Comments at 5 and RTC Reply at 3; McCaw Comments at 9; GTE Comments at 6-12; GTE Reply at 3-6; RCA at 3-4; CTIA Reply at 7-10, *citing CMRS Third Report and Order*, 9 FCC Rcd at 7994. CTIA likens the policy here to that applicable to forbearance.

[107] *Id.* at 3-4. The NYPSC contends that no alternative "voice-grade" mobile services presently exist in the New York market. This definition of substitutability is challenged by several commenters.

[108] Nextel Comments at 13. *See* NCRA Comments at 3.

[109] NCRA Comments at 4, *citing CMRS Second Report and Order*.

[110] The list includes the *CMRS Second Report and Order*; Memorandum of the United States in Response to Bell Companies' Motions for Generic Wireless Waivers, Department of Justice, Civ. Action No. 82-0192, July 25, 1994; Memorandum of the United States in Opposition to AT&T's Motion for a Waiver of Section 1(D) of the Decree in Connection with its Acquisition of McCaw, Department of Justice, Feb. 14, 1994. With respect to these filings, NYNEX, particularly, contends that NCRA's reliance upon DOJ's findings is misplaced because "none of the documents relied upon by the Department of Justice . . . address[es] the state of cellular competition in New York." NYNEX Reply at 3 n.7.

[111] Nextel Comments at 9-10 (footnotes in original omitted).

[112] Nextel Reply at 9-10 (footnotes in original omitted), *citing CMRS Second Report and Order*, 9 FCC Rcd at 1470.

> markets, this could take a minimum of several years, during which cellular operators will be permitted to enhance their already considerable market position. Moreover, although Nextel has made impressive strides in implementing its ESMR service in California, it cannot yet challenge the significant market power of cellular incumbents....
>
> There is no near-term competition in the wireless marketplace sufficient to discipline the current cellular marketplace. Until effective competition develops, continued rate regulation may be necessary in some states to restrain the dominant market power of cellular duopolists.

50. In opposition, many commenters emphasize that the existence of a duopolist market structure and arguments that the market is thus less than "fully competitive" are, of themselves, insufficient to sustain the state's burden of proof.[113] They argue, further, that the mere "threat" of future problems absent continuing regulation is insufficient to require us to grant the New York Petition.[114] One commenter, in particular, points out that "[t]he NYPSC never explicitly claims that its cellular marketplace is anticompetitive or that rates are unjust or unreasonable or discriminatory," and that the State's Petition is grounded on a policy of "deterrence," which is not a statutorily cognizable basis for authorizing continuing rate regulation of intrastate cellular rates.[115] In this regard, several commenters point to the NYPSC's statements, made in its 1989 proceeding to review, on its own motion, its regulatory policies for "Segments of the Telecommunications Industry Subject to Competition," that cellular service "is furnished competitively... [and that] these carriers do not need to be regulated...."[116]

51. Those opposing the NYPSC's Petition point to various indicia that the cellular market in New York is sufficiently competitive to protect consumers adequately from unreasonable rates. One commenter recites the following litany of developments in the New York cellular market, which it alleges proves that the market is "driven by carriers responding competitively to the needs of the marketplace:"[117] decreasing rates (including equipment), larger calling scopes, an increasing variety of ancillary services (including joint service), voice mail and other functionality, as well as extensive customer service organizations, and disparity in financial results and market shares. It contends that customer equipment costs have decreased from $1000 to $100 per cellular phone, that there are a greater number of service plans now available, that most Upstate New York MSAs have now been built out, eliminating "holes" previously common to those markets, that roaming rates per airtime minute among most carriers have decreased from $3 per day and $.99 per minute in 1985 to $.50 or less per minute and no daily charge, that customer service is now provided on a 24-hour basis with the assistance of "extremely sophisticated, essentially real time databases," that cumbersome and inaccurate billing systems have been replaced, and that joint services and special services such as voice mail are now available to a significant portion of the customer base.[118]

52. Supportive of these allegations are the comments of another cellular company, which states that "competitive pressure to expand its coverage area and to improve call quality has required it to invest hundreds of millions of dollars in a network infrastructure that includes almost 600 cell sites."[119] Yet another cellular company comments similarly:[120]

> In addition to an increase in the number of providers, since 1989 the industry has experienced significant growth in network capacity and coverage, and in subscribers. In the particular case of Cellular One of New York, the nonwireline carrier owned by McCaw's LIN Broadcasting subsidiary, capital investment has more than quadrupled since 1990, and cell sites now number more than 300 -- a tenfold increase during the past 8 years. Similarly, subscribership has risen tenfold over the same period. This increase of providers, subscribers and infrastructure investment, coupled with declining service rates, indicates that the NYPSC was correct initially in finding that cellular carriers are vigorously pursuing the market and do not need to be regulated.

53. Several other commenters also point to the growth rate for cellular as indicative of a competitive market. One alleges that cellular is growing domestically at an annual rate of more than 40 percent and that only 16.7 percent of

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[113] NYNEX Reply at 3; McCaw CCAW Comments at 5; CCI Comments at 16-18; CTIA Comments at 7-10; GTE Reply at 11; RTC Comments at 4-6; RTC Reply at 2; PageNet Comments at 3.

[114] CCI Comments at 15; PCIA Comments at 12.

[115] CCI Comments at 15, *citing* NYPSC Petition at 3.

[116] CCI Comments at 15 n.4; McCaw Comments at 16-17; NYNEX Comments at 5 n.12. *See* Opinion and Order Concerning Regulatory Response to Competition, Case No. 29469, dated May 16, 1989 (*1989 NYPSC Report*), attached to Comments filed by NYNEX, Sept. 19, 1994. The cited text states, in pertinent part, as follows:

> We conclude that [cellular] service is furnished competitively, for the market structure is one that has been designed by the FCC to be competitive. Additionally, the existence of resellers -- compounded by the existence of significant excess capacity -- operates to check monopoly abuses of the facilities-based carriers and reduce the potential for a duopoly. Our experience, which shows that these carriers do not need to be regulated, as well as that of more than half the states, which have deregulated or vastly reduced regulation of cellular service, also supports our conclusion that this market is competitive.
>
> We therefore will seek legislation that suspends the application of most aspects of the Public Service Law, including certification and rate regulation, to the provision of cellular service.

1989 NYPSC Report at 9-10.

[117] SWB Comments at 6.

[118] *Id.* at 6-7.

[119] NYNEX Comments at 6.

[120] McCaw Comments at 18 (referencing *1989 NYPSC Report* regarding the competitive nature of the cellular industry in New York State).

the national market has been tapped.[121] It contends that this growth potential, in combination with high intra-industry and inter-industry "churn" rates and rapid technological development, creates a dynamic and highly competitive cellular market.[122] Another commenter emphasizes that 73 percent of cellular revenues for New York State are generated in the New York City MSA, which has two facilities-based carriers and approximately 32 resellers.[123] Many commenters argue that alternative commercial mobile services already exist, such as wide-area Specialized Mobile Radio (SMR),[124] and that they constitute viable competitors to cellular and must be taken into account in assessing the competitiveness of CMRS in New York.[125] Several commenters remark that this already-competitive market will become more competitive with the advent of PCS and wide-area SMR and that these impending changes affect today's market and must also be taken into account when evaluating its present capacity to protect consumers.[126]

B. ***Elements of the NYPSC Case***

1. Pricing

54. As one elementLEMENTLEMENT of its case concerning failed market conditions, the NYPSC addresses rates and revenues for the New York State cellular market:[127]

> Statewide cellular operating revenues in the six MSAs increased 20% from 1991 to 1992. On average, revenues per access number declined by 8% from 1991 to 1992. Airtime minutes of useincreased by 24% and the number of access lines increased almost 30% during this period. Overall revenues per airtime minutes declined by 3% from 1991 to 1992.

The NYPSC contends that "[d]ue to the number of different rate plans . . . and the changes in average customer usage patterns caused by continued growth it is difficult to measure changes in price levels."[128] The NYPSC concedes, however, that "overall average prices are declining," but notes that they "remain considerably higher than comparable land line telephone services."[129] The NYPSC argues that its continued regulatory oversight is necessary "in order to ensure that the affordability of cellular service continues to improve."[130]

55. Commenters in opposition state that the NYPSC's concession regarding declining rates undercuts its case for failed market conditions[131] and they interpose a variety of objections to its comparing cellular to landline rates. Several note that residential land line rates are an improper basis for comparison because they are regulated and allegedly priced below cost.[132] Others contend that higher cellular rates merely reflect the fact that market risks[133] and expenses[134] are greater for cellular service. Still others challenge the comparison as incomplete or inapposite either because it fails to address ancillary services[135] or because the two services have different service and cost structures that are nowhere addressed by the NYPSC.[136]

56. Both the NYPSC and Nextel address the issue of prices in their replies. Reiterating its concession that rates are declining, the NYPSC attributes the decline to the "presence of regulation" and its deterrent effect on cellular rates.[137] Nextel, in comments largely addressed to market conditions in California, contends that decreasing cellular prices are not the result of competition but mere market strategies to encourage subscribers to "lock in" to long-term cellular service contracts with substantial termination penalties.[138]

2. Rate of Return on Common Equity

57. The NYPSC offers the following information concerning return on common equity in the New York cellular market:[139]

> In 1991 the return on common equity for those companies which provided information ranged from a high of 142% to a low of -42%. The average return was 47% for this period. In 1992, the returns ranged from 85% to a low of -118%, with an overall average return of 38.60%. In 1993, the returns, based on available data, ranged from a high of 79% to a low of

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[121] CTIA Comments at 14-15.

[122] CTIA explains that "churn" rates reflect customer switching, among cellular providers in the case of "intra-industry" churn, or to other telecommunications services in the case of "inter-industry" churn. CTIA contends that the inter-industry churn rate approaches 16 percent. *Id.* at 12-13, 20.

[123] CCICI Comments at 18.

[124] CCI contends that there are 458 SMRs operating in New York at this time. *Id.* at 17 n.6.

[125] CTIA Comments at 16-19; CCI Comments at 8-12; RCA Reply at 3; SWB Comments at 7 n.5; GTE Reply at 9.

[126] *See, e.g.*, GTE Reply at 11; CTIA Reply at 5.

[127] NYPSC Petition at 8. The NYPSC states that cellular carriers must file audited financial statements and annual reports containing data on their operating expenses and revenues, plant investment, and organizational and pricing information, for the purpose of tracking the effectiveness of competition in New York, which is assessed in annual reports issued by NYPSC staff. *Id.* at 7. The NYPSC states that "[s]ince approximately 93% of the 1992 New York State cellular telecommunications revenues were obtained in the five MSAs, the analysis focuses heavily upon the results of the ten carriers [in these markets]." *Id.* at 7 n.1.

[128] *Id.* at 8.

[129] *Id.* The NYPSC refers to a 1994 "Merrill Lynch Cellular/Telecommunications Report" stating that the average cellular rate per minute (including the monthly access fee) is "nine times that of local rates."

[130] *Id.*

[131] *See, e.g.*, RTC Comments at 7; SWB Comments at 8; NYNEX Comments at 10. CCI argues that, were inflation taken into account, cellular prices would be found to have declined even further. CCI Comments at 18.

[132] RTC Comments at 7; SWB Comments at 8-9. McCaw concurs and has submitted affidavit testimony in support of its position. McCaw Comments at 19.

[133] NYNEX Comments at 10; SWB Comments at 10.

[134] SWB Comments at 9.

[135] *Id.* at 10.

[136] NYNEX Comments at 10.

[137] NYPSC Reply at 15.

[138] Nextel Reply at 11-13.

[139] NYPSC Petition at 8-9.

> 0% with the average return of approximately 38%. This compares to 10-15% returns on equity for high tech companies from 1991-1993.

The NYPSC states that, while these data are not "dispositive of the competitiveness of the market,"[140] the returns of several companies exceed those for land line companies and "most unregulated high tech companies."[141] In its reply to comments critical of its rate of return analysis, the NYPSC emphasizes that it has adduced this information not to advocate, much less adopt, rate of return regulation for cellular services but as evidence that "cellular carriers could exercise excessive market power, absent regulatory oversight."[142]

58. Commenters discount completely the use of this rate of return data to suggest failed market conditions. They variously argue that rates of return on landline companies are inapposite because landline companies are subject to cost of service regulation,[143] that the NYPSC's computational methodology is unclear,[144] that high returns may be attributable to efficiency and length of investment and time in the market rather than to market power,[145] and that the variety of rates of return among cellular carriers confirms rather than refutes the existence of competition in the New York cellular market.[146] One commenter contends that return on common equity is a misleading ratio when used to measure the operational performance of an entity because it is significantly influenced by an entity's debt-to-equity ratio and thus is meaningful only to shareholders.[147] It explains that cellular carriers could be very highly leveraged or negligibly leveraged, as a result of which comparing the return on common equity of any two cellular providers would give no indication of the efficiency of operations or of the rates and charges of either. Another commenter claims that more highly leveraged capital structures typify cellular operations as compared to those of local exchange carriers.[148]

3. Market Share

59. The NYPSC contends, on the issue of market share, that "there is some evidence of market concentration in three out of the five major MSAs"[149] and provides the following information on cellular market shares within those MSAs:[150]

> For 1991, market share, as evidenced by total revenues, was roughly equal in two MSAs. In each of three MSAs one company had 80% of the market and the other had 20%.
>
> For 1992, in two MSAs one company had 70% of the market and the other had 30%. In one MSA, one company had 80% of the market and the other had 20%. In the other two MSAs, market shares were split 50/50. This data may indicate that one company had a dominant position and that absent continued oversight could have the incentive and opportunity to engage in anticompetitive pricing.

The NYPSC contends that, "[w]hile a 20% market share may be enough for a competitor to be successful in the telecommunications market, the purpose of market share data is to detect patterns within a market" and concludes that the data adduced, while "not dispositive," "suggest caution."[151]

60. Several commenters challenge the NYPSC's interpretation and use of this market share data, arguing that market share, standing alone, is insufficient proof of market power,[152] that market share shifts in a fluid industry such as cellular, that factors other than market power, such as operational efficiencies and facility size, could account for differences in market share,[153] that a 20 percent market share is sufficient to make a telecommunications firm competitive,[154] and that the NYPSC's reliance on the concept of dominance to make a case for noncompetitiveness is misplaced given Congress's and the Commission's explicit rejections of the distinction between dominant and nondominant firms as a conceptual tool for establishing regulatory distinctions among commercial mobile services.[155]

4. Consumer Complaints and Anticompetitive Practices

61. The NYPSC proffers the following information concerning consumer complaints and anticompetitive practices in furtherance of its contentions concerning failed market conditions in the New York cellular market. The NYPSC states that over the 12-month period ending May 31, 1994, it received 146 complaints against cellular companies, 66 of which were "rate-related (excessive, erroneous or disputed bills)" and the remaining 80 of which were related to service quality and other nonrate matters.[156] The NYPSC acknowledges that "the complaint rate is low," but, based on the fact that it received only 77 complaints for 1991 and

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140 *Id.* at 9.
141 *Id.* The NYPSC has appended to its petition a list of "high technology" companies and their reported "return on average equity" for 1991-1993.
142 NYPSC Reply at 14.
143 RTC Comments at 7. CCI concurs and notes that the NYPSC does not specify whether the comparison is to land line residential, business or intrastate toll rates. CCI Comments at 22 n.10.
144 McCaw Comments at 19-20.
145 RTC Comments at 7.
146 SWB Comments at 11.
147 *Id.*
148 *Id.*
149 NYPSC Reply at 14.
150 NYPSC Petition at 9.
151 NYPSC Reply at 14.
152 McCaw Comments at 22.
153 CCI Comments at 20-22.
154 SWB Comments at 12.
155 McCaw Comments at 21. *See also* CTIA Reply at 1-2; McCaw Reply at 7-8. Both commenters assert that the concept of dominance is irrelevant and has been explicitly rejected by the Commission in our forbearance analysis in the *CMRS Second Report and Order*.
156 NYPSC Petition at 9.

1992 (undifferentiated by the NYPSC as to content), observes that "the absolute number of complaints has increased significantly, by close to 100%."[157]

62. The NYPSC also provides information on two occurrences that it alleges constitute anticompetitive practices. The first involves a special pricing plan proposed for law enforcement organizations which NYPSC staff identified as discriminatory in the course of its routine review of tariff filings and which it successfully prevailed upon the cellular carrier to withdraw.[158] The NYPSC characterizes the second example as a "dispute between two cellular companies regarding roaming rates," in which one company blocked access to 911 and other emergency services when its customers were roaming in another carrier's service territory. The NYPSC resolved this dispute by ordering the two companies to enter into an interim roaming agreement, at a compensation schedule proposed by NYPSC staff.[159] The NYPSC concludes that:[160]

> [w]hile interconnection between carriers is the subject of another proceeding, this problem reflects the importance of state regulators having the authority to step in and resolve disputes which arise out of their rate authority which could have a significant impact on health and safety.

63. Commenters addressing the NYPSC's evidence on the issues of both consumer satisfaction and anticompetitive practices discount it as immaterial or irrelevant, or both. Several call attention to the NYPSC's admission that the complaint rate is "low."[161] Others challenge the validity of the data, arguing that it is unclear which of the 66 complaints concerning "excessive, erroneous or disputed bills" are truly related to "rate levels,"[162] that a 100 percent increase in consumer complaints is unimpressive where the original number was so small,[163] and that any increase in complaints must be measured against the 30 percent per year growth in the number of cellular access lines reported by the NYPSC.[164]

64. On the issue of anticompetitive practices, one commenter observes that the special pricing plan for law enforcement organizations "was no more offensive than previously accepted plans for other organizations."[165] Two commenters challenge the validity and significance of the evidence concerning the roaming dispute, arguing that it is insufficiently detailed,[166] that the NYPSC may have lacked jurisdiction to impose an agreement on the carriers,[167] and that the NYPSC's authority to settle these kinds of disputes will not be jeopardized by denial of its petition here because such matters involve interconnection and are subject to the NYPSC's "continuing authority to regulate the terms and conditions under which cellular service is provided."[168]

65. As a general matter, commenters also contend that the NYPSC's information concerning alleged improper practices is of marginal utility and evidentiary value because it is unaccompanied by supporting affidavits required under Section 20.13(a)(2)(vi)[169] and that "one dispute between two cellular carriers over the ten-year history of the provision of cellular service within the State dramatically underscores the lack of any need for a continuation of intrastate rate regulation."[170]

C. *Discussion*

66. Section 332(c)(3) provides that a state petition shall be granted if it "demonstrate[s]" that market conditions for the service at issue fail to protect subscribers adequately from unjust, unreasonable, or unreasonably discriminatory rates. On this record we conclude that New York has not made such a demonstration and, accordingly, we deny its petition.

67. Our decision is based in principal part on several factors. First, the NYPSC does not address the direct and fundamental changes to the duopoly cellular market structure that are being realized by PCS and other services, such as wide area SMR. Second, the NYPSC presents no systematic or authenticated evidence of collusive or otherwise anticompetitive practices concerning the provision of any CMRS. Third, the NYPSC does not present evidence showing widespread consumer dissatisfaction with CMRS providers in that state, or discuss what specific rate regulations are needed to address whatever level of dissatisfaction may exist. Fourth, the NYPSC fails to advance any persuasive analysis regarding the critical issue of investment by cellular licensees (or by any other CMRS providers).[171]

68. Our decision also is based in part on the NYPSC's own statements concerning market conditions. For example, it acknowledges that "overall average prices are declining"[172] and that "the complaint rate is low."[173] It requests continued rate regulation authority in order to "ensure that the affordability of cellular service continues to improve,"[174] and thereby concedes that conditions already are improving. It asserts that this Commission should not "wait until New York can establish that there are major problems[.]"[175] and thereby acknowledges the absence of any "major problems" today. And, by requesting authority

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157 *Id.* at 10.
158 *Id.*
159 *Id.*
160 *Id.* at 11 (footnote in original omitted), *citing* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408 (1994).
161 SWB Comments at 12; McCaw Comments at 24.
162 RTC Comments at 8.
163 NYNEX Comments at 8. NYNEX contends that only 0.15 percent of its own customers have complained to the NYPSC.
164 SWB Comments at 12, *citing* NYPSC Petition at 8. *See* CCI Comments at 21.
165 SWB Comments at 14. Similarly, CCI contends that the NYPSC has failed to demonstrate the lack of "reasonableness of the plan." CCI Comments at 8 n.29.
166 SWB Comments at 14.
167 *Id.* at 15.
168 NYNEX Comments at 13-14.
169 Vanguard Comments at 4. *See* 47 C.F.R. § 20.13(a)(2)(vi).
170 RTC Comments at 9 (emphasis in original omitted).
171 An important indicator of market failure, in our view, would be evidence that cellular firms are withholding investment in facilities as a means of restricting output and thus boosting price.
172 NYPSC Petition at 8.
173 *Id.* at 10.
174 *Id.* at 8.
175 *Id.* at 12.

for continued "light" regulation to "ensure that rates do not *become* discriminatory, unjust or unreasonable,"[176] it essentially admits that cellular rates are not presently unjust, unreasonable, or discriminatory.

69. Although NYPSC views any evidence of market imperfection as proof of a need for continued rate regulation, while it attributes all countervailing evidence to its regulatory oversight, it has not established the factual predicate of that line of reasoning. The NYPSC does not appear to have prescribed any particular CMRS pricing or rate development formula, and with minor exceptions, all currently effective and previously effective cellular rates in New York appear to have been carrier-initiated. On this record, we are not persuaded by the NYPSC's implicit argument that, absent continuation of its rate regulation authority, even for a limited period of time, cellular or other CMRS rates will quickly fall outside the zone of reasonableness. Given the nature of the NYPSC's regulatory system, we think it is reasonable to attribute improving market conditions to the operation of market forces rather than the NYPSC's regulatory system.

70. The rate of return on equity information the NYPSC offers in support of its Petition is unpersuasive. In general, we do not believe rate of return evidence alone constitutes sufficient ground to support a petition. In this regard, the relevant observation is not how such returns compare with those earned by traditionally regulated public utilities in mature, stable environments. Rather, any such observation must account for the fact that CMRS is a dynamic and relatively infant industry that is still developing. A key element of the study of markets is the recognition that not all industries and markets are at the same stage of development.[177] Thus, the comparison necessary for determining whether prices are just and reasonable is not with a mature industry, but with high growth industries. It has been shown that the rate of growth of output is one of the most important determinates of profitability, that is, all other things being equal, high growth firms (such as the cellular industry) tend to earn high profits.[178] Furthermore, even if profits are high now, the entry of PCS should contain those profits increasingly forcefully. Thus, evidence that cellular industry profits are higher than that we might allow, for example, for local exchange carriers, is not automatically disturbing.

71. Against this background, we conclude that the NYPSC's case is unpersuasive. As noted previously, this is largely due to the spare nature of the evidence on which the NYPSC's case is constructed. In addition to the specific evidentiary shortcomings discussed above, we note that the NYPSC submitted no provider-specific information on customers and customer trends for cellular or any other commercial mobile services. Its evidence concerning revenues is limited to the observation that 73 percent of cellular revenues are garnered in the New York City market, a market in which there appear to exist approximately 32 resellers, which suggests substantial competition at the retail level. The information proffered by the NYPSC on rates of return on common equity is unpersuasive because the NYPSC fails to provide accompanying data, such as the debt/equity ratios underlying such returns, that would enable us to assess those data meaningfully. New York also provides no information on infrastructure investment or the deployment of new services, facilities, or technologies in the State of New York. The NYPSC identifies only two instances of anticompetitive behavior by CMRS providers, neither of which is supported by affidavit testimony, as required by our rules. Even if such evidence were supported by affidavit, two examples do not constitute a sufficient showing to support a request to regulate an entire industry. For these reasons, and those discussed previously, we deny the NYPSC's Petition.

VI. REGULATION OF OTHER TERMS AND CONDITIONS

72. Prior to OBRA, Section 332 prohibited the states from imposing "rate ... regulation" upon certain wireless telecommunications carriers.[179] This prohibition was construed broadly to preclude almost all state regulatory activity.[180] As revised by OBRA, Section 332(c)(3) now prohibits states from regulating "the rates charged" for CMRS,

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[176] *Id.* at 4.

[177] For example, J. Prescott, A Kohli, and N. Ven Katraman have shown that the determinants of rate of return on investment vary between mature industries and emerging industries. *See* J. Prescott, A Kohli, and N. Ven Katraman, "The Marketshare-Profitability Relationship: An Empirical Assessment of Major Assertions and Contradictions," Strategic Management Journal 377-394(Spring 1986). They found, for example, that high market share is correlated with high rates of return in mature industries, but not for emerging industries. *Id.* at 386.

[178] David Ravenscraft "Structure-Profit Relationship at the Line of Business and Industry Level" Review of Economic and Statistics 22-31 (February 1983).

[179] The statute provided in relevant part that "[n]o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service . . . ." 47 U.S.C. § 332(c)(3) (prior to revisions enacted by OBRA).

[180] *See, e.g.*, Telocator Network of America v. FCC (Millicom), 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission's interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). *See also, e.g.*, American Teltronix (Station WNHM552), 3 FCC Rcd 5347 (1988)("Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier."), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990)(note omitted) ("state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute .... [A]ccompanying legislative history reveals that Congress recognized the Commission's broad discretion to dictate which land mobile systems are to be regulated as private."). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission's Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 (para. 24 n.19) (1990)):

> If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

but it expressly reserves to them the authority to regulate the "other terms and conditions of commercial mobile services." Although there is no definition of the term "the rates charged" in the statute or its legislative history, there is legislative history regarding the "other terms and conditions" language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities the New York PSC is entitled to continue, despite our denial of its Petition.

73. The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:[181]

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

74. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented by the New York Petition and related comments. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

75. First, although the NYPSC may not prescribe, set, or fix rates in the future because it has lost authority to regulate "the rates charged" for CMRS, it does not follow that its complaint authority under state law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates.[182] In consequence, it is conceivable that matters might arise under state complaint procedures that relate to "customer billing information and practices and billing disputes and other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit New York to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.

76. Second, under the same logic, we also conclude generally that several other aspects of a state's existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the public utility commission, or whatever other agency the state decides to designate, does not strike us as rate regulation, so long as nothing more than standard informational filings is involved. Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Put another way, we believe New York retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state. We expect that, to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of the New York regulatory practice at issue.

VII. ORDERING CLAUSES

77. Accordingly, pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), IT IS ORDERED that the Petition of the New York State Public Service Commission To Extend Rate Regulation IS DENIED for the reasons set forth above.

78. IT IS FURTHER ORDERED, pursuant to Sections 1.4(b), 1.4(b)(2), and 1.106(f) of the Commission's Rules, that any petition for reconsideration of this order SHALL BE FILED within thirty days of the day after the day on which public notice of this action is given.[183]

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[181] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261.

[182] *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person "complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208(a) (emphasis added).

[183] Although we assigned the NYPSC Petition a docket number for administrative convenience, this is an adjudicatory-type proceeding, not a rulemaking.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

List of Parties Filing Comments

Party (and Short Title)

American Mobile Telecommunications Association, Inc. (AMTA)
Cellular Telecommunications Industry Association (CTIA)
Contel Cellular, Inc. (CCI)
E.F. Johnson Company (E.F. Johnson)
McCaw Cellular Communications, Inc. (McCaw)
Mobile Telecommunication Technologies Corp. (MTel)
National Cellular Resellers Association (NCRA)
Nextel Communications, Inc. (Nextel)
NYNEX Mobile Communications Company (NYNEX)
Paging Network, Inc. (PageNet)
Personal Communications Industry Association (PCIA)
Rochester Tel Cellular Holding Corporation (RTC)
Southwestern Bell Mobile Systems, Inc. (SWB)
Vanguard Cellular Systems, Inc. (Vanguard)

List of Parties Filing Reply Comments

Cellular Telecommunications Industry Association (CTIA)
GTE Service Corporation (GTE)
McCaw Cellular Communications (McCaw)
Mobile Telecommunication Technologies Corp. (MTel)
Nextel Communications, Inc. (Nextel)
NYNEX Mobile Communications Company (NYNEX)
PageMart, Inc. (PageMart)
Rochester Tel Cellular Holding Corporation (RTC)
Rural Cellular Association (RCA)
State of New York, Public Service Commission (NYPSC)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Multimedia Cablevision, Inc. — CUID Nos. KS0018, Larned; NC0182, Pitt; NC0413, Lenoir

Order Dismissing Complaints

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1995; Released: April 14, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Multimedia Cablevision, Inc. ("Multimedia") was charging for its cable programming service ("CPS") tier in numerous communities in Kansas and North Carolina (the "subject communities"). *See* Appendix for a list of the subject communities and the number of basic and CPS channels Multimedia offered in each community both before and after September 1, 1993. Rather than attempting to justify its prices through a benchmark or cost of service showing, Multimedia responded to the complaints by stating that it has no CPS tier in those systems. On April 11, 1995, Multimedia submitted information supporting its claim that CPS tiers subject to rate regulation did not exist as of September 1, 1993 and still do not exist in any of the subject communities in response to a letter from the Commission staff.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. BACKGROUND

4. The Cable Services Bureau has addressed the regulatory status of packages of channels offered on an a la carte basis in several orders resolving letters of inquiry ("LOIs") directed to cable operators. Of particular relevance to this case, the Cable Services Bureau has released orders resolving LOIs regarding Century Cable TV's ("Century") systems in Huntington, West Virginia; Morgantown, West Virginia; Muncie, Indiana; Owensboro, Kentucky; Yuma, Arizona; Brunswick, Georgia; and San Juan, Puerto Rico.[11] Relying on the Commission's *Going Forward Order*,[12] the Bureau's orders addressed the restructured service offerings implemented in these communities beginning September 1, 1993, in which Century eliminated its CPS tiers and offered instead only a basic service tier and a few a la carte channels. In each of these orders, the Bureau found that Century's restructured service offerings did not constitute a clear evasion of our rate rules. Specifically, the Bureau found that Century did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other

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[1] Letter from Zenji Nakazawa, FCC, to David P. Fleming, Vice President and General Counsel, Multimedia Cablevision, Inc. (March 30, 1995).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See Century Cable TV, Huntington, West Virginia*, LOI-93-49, DA 94-1314, 9 FCC Rcd 7337 (Cab. Serv. Bur. 1994); *Century Cable TV, Morgantown, West Virginia*, LOI-93-34, DA 94-1358, 10 FCC Rcd 115 (Cab. Serv. Bur. 1994); *Century Cable TV, Muncie, Indiana*, LOI-93-18, DA 94-1354, 10 FCC Rcd 99 (Cab. Serv. Bur. 1994); *Century Cable TV, Owensboro, Kentucky*, LOI-93-45, DA 94-1361, 10 FCC Rcd 127 (Cab. Serv. Bur. 1994); *Century Cable TV, Yuma, Arizona*, LOI-93-39, DA 94-1360, 10 FCC Rcd 123 (Cab. Serv. Bur. 1994); *Century Cable TV, Brunswick, Georgia*, LOI-93-44, LOI-94-4, DA 94-1426 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, LOI-93-38, DA 94-1425 (Cab. Serv. Bur., released Dec. 12, 1994).

[12] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).

channels, the orders permit Century to treat its a la carte packages as new product tiers that may be priced at market levels under the *Going Forward Order*.

5. Since the LOI orders found that the elimination of Century's CPS tiers did not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as new product tiers, there were no CPS tiers in those communities, as of September 1, 1993, that were subject to rate regulation pursuant to Section 76.922 of our rules. Therefore, the Bureau subsequently dismissed all FCC Form 329 complaints filed against Century in each of those seven communities.[13]

III. DISCUSSION

6. The rate cards and channel line-up cards submitted by Multimedia for each of the subject communities indicate that Multimedia restructured its service offerings in the subject communities on September 1, 1993 in essentially the same way that Century did for the seven areas mentioned above where LOI orders have been issued. Multimedia discontinued its CPS offerings and placed all of its channels into a single basic service tier, except for four to six channels which it offered on an a la carte basis.[14] In each of the subject communities, all of the channels in the a la carte package were previously offered on Multimedia's basic service tier, with the exception of Headline News in CUID No. KS0018, which was not previously offered in this community.

7. We feel that we have sufficient information regarding Multimedia's restructured offerings in the subject communities to conclude, in accord with the *Going Forward Order*, that they should be treated the same way that we treated Century's restructured offerings in the seven communities where we issued LOI orders. As in these latter communities, although the instant restructuring resulted in the elimination of Multimedia's CPS tiers, the small number of channels that were offered in the a la carte packages did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the LOI orders, we will allow Multimedia to treat its a la carte packages in the subject communities as new product tiers even though they would not qualify as new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier. Thus, we need not rule on the FCC Form 329 complaints filed against Multimedia in the subject communities because there were no CPS tiers subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993. In addition, nothing in these complaints indicates that Multimedia's new product tiers violate any of the conditions for establishing those tiers outlined in the *Going Forward Order*.[15]

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that the a la carte packages created by Multimedia Cablevision, Inc. in the communities listed in the attached Appendix may be treated as new product tiers under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of Multimedia Cablevision, Inc. in each of the communities listed in the attached Appendix are DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[13] *See Century Cable TV*, CUID Nos. IN0094, WV0156, WV0378, KY0120, AZ0019, DA 94-1422 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, CUID No. PR0001, DA 94-1530 (Cab. Serv. Bur., released Dec. 20, 1994); *Century Cable TV, Brunswick, Georgia*, CUID No. GA0040, DA 94-1531 (Cab. Serv. Bur., released Dec. 20, 1994).

[14] In CUID No. KS0018, Multimedia offered a six-channel a la carte package consisting of CNN, Headline News, TBS, Family Channel, The Nashville Network, and TNT. In CUID No. NC0182, Multimedia offered a four-channel a la carte package consisting of CNN, The Nashville Network, TNT, and Headline News. In CUID No. NC0413, Multimedia offered a five-channel a la carte package consisting of CNN, The Nashville Network, TNT, Discovery, and Headline News.

[15] We have excused one violation, *i.e.*, migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

APPENDIX

CUID	Community	8/31/93 *Pre-Regulation* Basic	Tiers	9/1/93 *Post Regulation* Basic	Tiers	A la Carte
KS0018	Larned	8	11	14	0	6
NC0182	Pitt County	10	17	23	0	4
NC0413	Lenoir County	8	20	23	0	5

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Multimedia Cablevision, Inc. — CUID Nos. IL0445, Oak Lawn; IL0924, South Holland

Order Dismissing Complaints

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1995; Released: April 14, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Multimedia Cablevision, Inc. ("Multimedia") was charging for its cable programming service ("CPS") tier in two communities in Illinois (the "subject communities"). *See* Appendix for a list of the subject communities and the number of basic and CPS channels Multimedia offered in each community both before and after September 1, 1993. Rather than attempting to justify its prices through a benchmark or cost of service showing, Multimedia responded to the complaints by stating that it has no CPS tier in those systems. On April 11, 1995 Multimedia submitted information supporting its claim that CPS tiers subject to rate regulation did not exist as of September 1, 1993 and still do not exist in either of the subject communities in response to a letter from the Commission staff.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. BACKGROUND

4. The Cable Services Bureau has addressed the regulatory status of packages of channels offered on an a la carte basis in several orders resolving letters of inquiry ("LOIs") directed to cable operators. Of particular relevance to this case, the Cable Services Bureau has released orders resolving LOIs regarding Century Cable TV's ("Century") systems in Huntington, West Virginia; Morgantown, West Virginia; Muncie, Indiana; Owensboro, Kentucky; Yuma, Arizona; Brunswick, Georgia; and San Juan, Puerto Rico.[11] Relying on the Commission's *Going Forward Order*,[12] the Bureau's orders addressed the restructured service offerings implemented in these communities beginning September 1, 1993, in which Century eliminated its CPS tiers and offered instead only a basic service tier and a few a la carte channels. In each of these orders, the Bureau found that Century's restructured service offerings did not constitute a clear evasion of our rate rules. Specifically, the Bureau found that Century did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other channels, the orders permit Century to treat its a la carte packages as new product tiers that may be priced at market levels under the *Going Forward Order*.

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[1] Letter from Zenji Nakazawa, FCC, to David P. Fleming, Vice President and General Counsel, Multimedia Cablevision, Inc. (March 30, 1995).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See Century Cable TV, Huntington, West Virginia*, LOI-93-49, DA 94-1314, 9 FCC Rcd 7337 (Cab. Serv. Bur. 1994); *Century Cable TV, Morgantown, West Virginia*, LOI-93-34, DA 94-1358, 10 FCC Rcd 115 (Cab. Serv. Bur. 1994); *Century Cable TV, Muncie, Indiana*, LOI-93-18, DA 94-1354, 10 FCC Rcd 99 (Cab. Serv. Bur. 1994); *Century Cable TV, Owensboro, Kentucky*, LOI-93-45, DA 94-1361, 10 FCC Rcd 127 (Cab. Serv. Bur. 1994); *Century Cable TV, Yuma, Arizona*, LOI-93-39, DA 94-1360, 10 FCC Rcd 123 (Cab. Serv. Bur. 1994); *Century Cable TV, Brunswick, Georgia*, LOI-93-44, LOI-94-4, DA 94-1426 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, LOI-93-38, DA 94-1425 (Cab. Serv. Bur., released Dec. 12, 1994).

[12] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).

5. Since the LOI orders found that the elimination of Century's CPS tiers did not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as new product tiers, there were no CPS tiers in those communities, as of September 1, 1993, that were subject to rate regulation pursuant to Section 76.922 of our rules. Therefore, the Bureau subsequently dismissed all FCC Form 329 complaints filed against Century in each of those seven communities.[13]

III. DISCUSSION

6. The rate cards and channel line-up cards submitted by Multimedia for each of the subject communities indicate that Multimedia restructured its service offerings in the subject communities on September 1, 1993 in essentially the same way that Century did for the seven areas mentioned above where LOI orders have been issued. Multimedia discontinued its CPS offerings and placed all of its channels into a single basic service tier, except for five channels which it moved from the basic service tier into an eight channel a la carte package.[14] The remaining three channels in the a la carte package were not previously offered on either Multimedia's basic service tier or its cable programming services tier.[15]

7. We feel that we have sufficient information regarding Multimedia's restructured offerings in the subject communities to conclude, in accord with the *Going Forward Order*, that they should be treated the same way that we treated Century's restructured offerings in the seven communities where we issued LOI orders. As in these latter communities, although the instant restructuring resulted in the elimination of Multimedia's CPS tiers, the small number of channels that were removed from rate-regulated tiers and offered in the a la carte packages did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the LOI orders, we will allow Multimedia to treat its a la carte packages in the subject communities as new product tiers even though they would not qualify as new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier. Thus, we need not rule on the FCC Form 329 complaints filed against Multimedia in the subject communities because there were no CPS tiers subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993. In addition, nothing in these complaints indicates that Multimedia's new product tiers violate any of the conditions for establishing those tiers outlined in the *Going Forward Order*.[16]

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that the a la carte packages created by Multimedia Cablevision, Inc. in the communities listed in the attached Appendix may be treated as new product tiers under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of Multimedia Cablevision, Inc. in each of the communities listed in the attached Appendix are DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith M. Jones
Chief, Cable Services Bureau

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[13] *See Century Cable TV*, CUID Nos. IN0094, WV0156, WV0378, KY0120, AZ0019, DA 94-1422 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, CUID No. PR0001, DA 94-1530 (Cab. Serv. Bur., released Dec. 20, 1994); *Century Cable TV, Brunswick, Georgia*, CUID No. GA0040, DA 94-1531 (Cab. Serv. Bur., released Dec. 20, 1994).

[14] The five channels which were removed from the basic service tier are Turner Network Television (TNT), Cable News Network (CNN), Headline News, The Discovery Channel (TDC), and Turner Network News (TNN).

[15] The three channels which comprise part of the a la carte packages but which were not formerly offered on a rate-regulated tier are Cartoon Network, The Learning Channel (TLC), and ESPN2.

[16] We have excused one violation, *i.e.*, migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

APPENDIX

CUID	Community	8/31/93 *Pre-Regulation* Basic	Tiers	9/1/93 *Post Regulation* Basic	Tiers	A la Carte
IL0445	Oak Lawn	18	23	38	0	8
IL0924	South Holland	18	23	40	0	8

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-417

In the Matter of

Amendment of Section 73.606(b), RM-6108
Table of Allotments,
Television Broadcast Stations.
(*Lima, Ohio; Muncie, Indiana,*
Rockford, Illinois, and
Grand Rapids, Michigan)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 21, 1995; Released: July 31, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it an application for review filed by Lima Communications Corporation ("WLIO"), licensee of television Station WLIO(TV), UHF television Channel 35, Lima, Ohio, of the *Memorandum Opinion and Order* in this proceeding, 7 FCC Rcd 5933 (1992) (*"MO&O"*). Trinity Christian Center of Santa Ana, d/b/a Trinity Broadcasting Network ("Trinity"), licensee of WDLI, television Channel 17, Canton, Ohio, filed an opposition.

2. This proceeding was initiated by WKBN Broadcasting Corporation ("WKBN"), which filed a proposal for the deletion of unused and unapplied for non-commercial educational ("NCE") UHF television Channel *17 from Muncie, Indiana, the dereservation of that NCE channel, and its reallocation as a commercial channel to Lima, Ohio. In response, we issued a *Notice of Proposed Rule Making and Order to Show Cause*, 2 FCC Rcd 6233 (1987) (*"Notice"*). By *Report and Order*, 3 FCC Rcd 4621 (1988) (*"R&O"*), we adopted that proposal, substituting, *inter alia*, NCE UHF TV Channel *61 in Lima for NCE UHF TV Channel *17 in Muncie and reallotting Channel 17 to Lima as its third commercial TV channel.[1] WLIO filed a petition for reconsideration of the *R&O*, which was subsequently affirmed in an *MO&O*;[2] denying WLIO's petition for reconsideration. Then, WLIO submitted its application for review.

3. Subsequently, WKBN filed a withdrawal of its commitment to file an application for authority to construct a TV station on Channel 17 at Lima. It cites the change in circumstances and the relocation of the reference coordinates for Channel 17, ordered in the *MO&O*, as reasons for its loss of interest in pursuing the Lima Channel 17 allotment. In accordance with §1.420(j) of the Commission's Rules, WKBN submitted an affidavit stating that neither it nor any of its principals has received nor will receive any consideration for the withdrawal of WKBN's expression of interest.

4. The *Notice* stated that the proponent of an allotment must restate its intention to apply for the channel if allotted and, if the application is granted, to construct a station promptly. Where such an expression of continuing interest is not filed, then the proposal may be denied. Here, WKBN states unequivocally that it has no interest in applying to operate a station on Channel 17 in Lima and no other entity has expressed any interest in doing so. We will, therefore, deny in its entirety, WKBN's proposal to allot Channel 17 to Lima, and return to *status quo ante* the television allotments in the communities of Lima, Ohio; Muncie, Indiana; Rockford, Illinois; and Grand Rapids, Michigan. Thus, WLIO's application for review will be dismissed as moot and the television channel allotments made at the respective communities will be rescinded and the old allotments restored.

5. Accordingly, IT IS ORDERED, That the television allotments to the following communities are rescinded:

Community	Allotment
Lima, Ohio	Channel 17
Muncie, Indiana	Channel *61-
Rockford, Illinois	Channel 17+
Grand Rapids, Michigan	Channel 17-

6. IT IS FURTHER ORDERED, That the Table of Allotments, Section 73.606(b), is corrected to read as follows:

Community	Channel No.
Lima, Ohio	35-, 44+, *57+
Muncie, Indiana	*17+, 49
Rockford, Illinois	13, 17-, 39
Grand Rapids, Michigan	8+, 13+, 17, *35+

7. IT IS FURTHER ORDERED That the application for review filed by Lima Communications Corporation IS DISMISSED AS MOOT.[3]

8. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

9. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180.

[1] The *R&O* also modified the frequency offsets for TV Channel 17- in Rockford, IL and Channel 17 in Grand Rapids, MI to specify Channel 17+ and Channel 17-, respectively, in order to accommodate the ordered zero frequency offset of Channel 17 for Lima. Neither the Grand Rapids nor Rockford allotment was otherwise affected by the *R&O*.

[2] The *MO&O* also modified the reference coordinates for Channel 17 in Lima to a site located at North Latitude 40-34-30 and West Longitude 84-28-30, which is 2.4 km (1.5 mi) southwest of the coordinates specified in the *R&O*.

[3] The Chief, Policy and Rules Division takes this action pursuant to §§ 0.283 and 1.115 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-29

In the Matter of

Amendment of Section 73.202(b),	RM-8596
Table of Allotments,	RM-8637
FM Broadcast Stations.	
(Iron Mountain and	
Negaunee, Michigan)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 24, 1995; Released: July 31, 1995

By the Chief, Allocations Branch:

1. In response to a petition filed by Superior Media Group, Inc. ("Superior Media"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 10 FCC Rcd 2299 (1995), seeking the allotment of Channel 294A at Iron Mountain, Michigan, as that community's third FM broadcast service. Superior Media filed comments supporting the allotment of Channel 294A at Iron Mountain. In response to the *Notice*, Negaunee Miners Radio ("Negaunee Miners") filed a counterproposal.[2] Superior Media and Negaunee Miners filed reply comments.

2. Negaunee Miners' counterproposal requests allotment of Channel 294A at Negaunee, Michigan. Negaunee Miners states that Negaunee has a 1990 U. S. Census population of 4,918 persons. Negaunee Miners points out that Negaunee has an elected mayor and city council, its own police and fire departments and post office and is a community worthy of a radio station. Further, the allotment will provide a first local service to the community of Negaunee while Superior Media seeks a third FM service for Iron Mountain.

3. In reply comments, Superior Media states that it has no objection to allotment of a channel at Negaunee provided a frequency is also allotted to Iron Mountain. Superior Media states that its engineering studies indicate several other channels are available for allotment at Negaunee consistent with all allotment criteria. Accordingly, Superior Media contends that since alternate channels are available, the Commission should allot an FM frequency to Iron Mountain as well as Negaunee.

4. After consideration of the information filed in this proceeding, we believe the public interest would be served by the allotment of FM channels at Iron Mountain and Negaunee, Michigan, in order to provide new or additional service to both communities. In response to the *Notice*, we will allot Channel 294A to Iron Mountain, Michigan, as that community's third FM broadcast service. Channel 294A can be allotted to Iron Mountain in compliance with the Commission's minimum distance separation requirements of the Commission's Rules without a site restriction.[3] In response to the counterproposal filed by Negaunee Miners, we shall allot Channel 258A to Negaunee, Michigan, in compliance with the Commission's spacing requirements without a site restriction.[4] Canadian concurrence has been received for the allotment of Channel 294A at Iron Mountain and Channel 258A at Negaunee as both communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 14, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Iron Mountain, Michigan	226C1, 268C1, 294A
Negaunee, Michigan	258A

6. The window period for filing applications for Channel 294A at Iron Mountain, Michigan and Channel 258A at Negaunee, Michigan, will open on **September 14, 1995**, and close on **October 16, 1995**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The community of Negaunee has been added to the caption.
[2] Public notice of the counterproposal was given on May 11, 1995, Report No. 2072 (RM-8637).
[3] The coordinates for Channel 294A at Iron Mountain are 45-49-12 and 88-04-06.
[4] The coordinates for Channel 258A at Negaunee are 46-30-18 and 87-36-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application for Review of

Mr. Jack Whitehorn — File Nos. BTC-810428HV and BTCH-810428HW

Stations WFDR and WFDR-FM
Manchester, Georgia

ORDER

Adopted: July 19, 1995; Released: July 31, 1995

1. The Commission has under consideration an application for review filed by Mr. Jack Whitehorn ("Whitehorn") on October 18, 1994. On August 17, 1992, Whitehorn filed a "Petition for Revocation of License" which sought to have the Commission set aside the 1981 grant of the applications for transfer of 100% control of WFDR, Inc., licensee of Stations WFDR and WFDR-FM (now WVFJ-FM), Manchester, Georgia (BTC-810428HV and BTCH-810428HW) from WFDR, Inc., Debtor-in-Possession to Provident Broadcasting Company (Provident). The Chief, Audio Services Division, Mass Media Bureau, acting pursuant to authority delegated by 47 C.F.R. Section 0.283, denied Whitehorn's petition by letter dated April 6, 1994.

2. On April 25, 1994, Whitehorn filed a "Notice of Appeal" to the United States Court of Appeals for the District of Columbia Circuit seeking to reverse the staff's action dismissing his petition. By Order dated September 29, 1994, the Court granted the Commission's motion to dismiss Whitehorn's appeal (Case No. 94-1331). The Court found that Whitehorn failed to seek appropriate review by the full Commission before seeking judicial review, as required under 47 U.S.C. Section 155 (c) (7). This section provides that a petitioner must file an application for review with the full Commission as a "condition precedent to judicial review."

3. By filing his application for review on October 18, 1994, Whitehorn now seeks to cure the procedural defect in his case. However, Section 1.104 (b) of the Commission's Rules requires that an application for review of a final action taken pursuant to delegated authority be filed within 30 days of the date of public notice of such action. Whitehorn's application for review, filed October 18, 1994, was submitted more than six months from the final action of the Chief, Audio Services Division.[1] Thus, it is untimely and will be dismissed.[2]

4. Accordingly, IT IS ORDERED, that the application for review filed by Jack Whitehorn on October 18, 1994 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] It also appears that the Enforcement Division of the Mass Media Bureau dismissed Whitehorn's August 17, 1992 petition on August 17, 1994. His request for review of that dismissal action is similarly untimely.

[2] We further note that Whitehorn, on the merits, raises no new facts or circumstances warranting further Commission action or inquiry.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Channel 5 Public Broadcasting, Inc. against WestStar Cable	CSR-3799-M CA0730

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1995; Released: August 1, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On July 23, 1993, the Commission released a decision in the above proceeding, pursuant to delegated authority, holding that television broadcast station KNPB (Educ., Channel 5), Reno, Nevada, was entitled to mandatory carriage on the cable system operated by WestStar Communications I (WestStar) at Truckee, California pursuant to Section 76.55(b) of the Commission's Rules, unless WestStar provided the requisite engineering data to support its claim that the station had poor signal quality at its headend, which was located at Ward Peak, California, according to the system. *Complaint of Channel 5 Public Broadcasting, Inc. against WestStar Cable*, 8 FCC Rcd 4953 (1993). Accordingly, WestStar filed a video tape and a "Supplement To Opposition" on August 25, 1993, to which KNPB replied on September 9, 1993. Thereafter, WestStar filed a response to the reply, together with a motion for leave to file it, on September 22, 1993, to which KNPB filed comments on October 27, 1993, requesting that the Commission hold any action in abeyance until it had an opportunity to file its own "Supplemental Signal Measurement Report," which it did on February 22, 1994. WestStar filed comments on the supplemental report on April 1, 1994, and KNPB replied to them on April 29, 1994. WestStar later filed another letter on May 17, 1994, and on May 19, 1994, KNPB filed a supplement to its prior reply to WestStar's supplemental report of April 1, 1994.

THE PARTIES' ARGUMENTS

2. In its supplement, WestStar cited the Commission's *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965, 2968 (1993), and explained that, although it previously had referenced its Ward Peak facility as its principal headend, this was incorrect and that, in fact, its principal headend is its facility on Indian Jack Road. According to WestStar, this facility is the one that directly serves subscribers, is near the system's geographic center, has the system's signal processing equipment, receives all satellite channels, as well as the majority of the signals transmitted by the system, and is the location from which the system's channels emanate. WestStar adds that this is the location where it took its supplemental measurements in compliance with the guidelines specified in the Commission's previous decision in this case, in addition to some it took at Ward Peak, where it had made its initial measurements discussed in our prior decision.[1] According to this data, KNPB's best signal at Indian Jack Road, -88 dBm, was significantly below the minimum standard specified by the Commission in its prior decision, and the station's translator, on Channel 54, registered "no measurable signal" there. Similarly, at Ward Peak, KNPB had "no measurable signal," and the signal level for its translator measured the requisite -49 dBm level only twice during the 24-hour test period.[2]

3. In its reply, KNPB argues that WestStar's late assertion that its principal headend is on Indian Jack Road, which is in a valley, is disingenuous since WestStar also states that it receives television broadcast signals off-air at Ward Peak and sends them by microwave to its facility on Indian Jack Road. In addition, KNPB offers to test ". . . specializing receiving equipment, at its own cost . . . " at WestStar's Ward Peak headend.

4. In response, WestStar repeats the reasons for its choice of Indian Jack Road as its principal headend, and asserts that it had made a "good faith error" in its earlier pleading when it incorrectly stated that its principal headend was at Ward Peak. WestStar also notes that it did list its principal headend as 10181 Indian Jack Road, Truckee, in its April 30, 1993, certified letter to KNPB, and that this was the location given by the cable system's General Manager, Alan Harry, in his sworn "Declaration," which was filed with the Commission on August 25, 1993, as part of WestStar's supplement in this proceeding. Moreover, according to WestStar, KNPB appears to be avoiding the one issue crucial to this whole proceeding, namely the station's signal quality, which WestStar notes is inadequate either at Ward Peak or at WestStar's designated headend on Indian Jack Road. Moreover, WestStar maintains that, even if KNPB had the requisite signal strength at Ward Peak, it

[1] Specifically, the following five measurements of KNPB's signal strength were taken on August 4, 1993, by WestStar's Chief Technician, Stan Mendes, at WestStar's facility on Indian Jack Road: -92 dBm, -92 dBm, -89 dBm, -89 dBm, and -88 dBm. The same day Mr. Mendes also took five measurements of the station's translator at the same location, but he obtained "no measurable signal" on any of them. Similarly, on July 27 and 28, 1993, fourteen measurements were taken of KNPB's signal at Ward Peak and each of them revealed "no measurable signal." When fourteen additional measurements were taken of the station's translator at the same location and on the same days, the following signal levels were recorded: -51 dBm, -56 dBm, -53 dBm, -53 dBm, -53 dBm, -52 dBm, -52 dBm, -52 dBm, -50 dBm, -50 dBm, -49 dBm, -51 dBm, and -49 dBm. (No measurement could be taken at noon, because the signal was not on the air.)

[2] In para. 5 of the prior decision herein, the Commission explained that generally acceptable engineering practices mandate that a series of measurements be made in order to accurately determine a station's signal level, and that in cases where the test results are less than -55 dBm for a VHF signal (such as Channel 5), it is necessary to make at least four readings over a two hour period, but if the initial readings are between -55 dBm and -49 dBm, inclusive, then it is necessary to take readings over a 24 hour period with measurements no more than four hours apart in order to establish reliable test results. *Complaint of Channel 5*, 8 FCC Rcd at 4953.

would still be financially responsible for delivering the signal by CARS microwave to WestStar's Indian Jack Road headend, which WestStar states is what is done with its other broadcast stations.

5. As part of its supplement, KNPB includes an "Engineering Statement" dated February 16, 1994, from the Station's Vice-President, Engineering, Operations, and Computer Services, Tom Werner. According to this report, the signal strength of the station's translator at the output terminals of the antenna utilized on November 9, 1993, at WestStar's Ward Peak facility was 1,400 microvolts, which it states is the equivalent of -45.83 dBm. When a preamplifier provided by the station was added, along with sixty feet of feeder cable to attach it to the system's microwave equipment, the signal measured more than 10,000 microvolts, or -28.75 dBm. According to the report, measurements made by Stan Mendes were substantially the same ". . . within 1 or 2 Decibels." The report concludes that if, as Stan Mendes maintains, it is required to deliver a signal of -45 dBm to the system's first active device (namely the KNPB supplied pre-amplifier), it has exceeded this requirement by approximately 100 times. Mr. Werner adds that KNPB's overall signal was very good, except for some ghosting, which he states is easy to resolve now through ghost cancelling techniques.

6. In its comments on KNPB's supplement, WestStar again reiterates its reasons for selecting the Indian Jack Road as its principal headend, and it notes that its configuration, with an antenna array at a remote mountaintop to receive off-air signals, which are then transmitted by microwave to a headend for processing and distribution to subscribers, is hardly a novel concept, particularly since cable systems originally developed in areas, such as the Tahoe Basin of the Sierra Nevada Mountains, where hilly terrain frequently blocked residents' direct home reception of off-air television signals. WestStar adds that this same configuration was discussed more than ten years ago in the legislative history of the *Cable Communications Policy Act of 1984*, S. Rep. No. 67, 98th Cong., 1st Sess. 4 (1983). In addition, WestStar notes that the signal of KNPB's translator only measured -45.83 dBm at Ward Peak on November 9, 1993. Moreover, WestStar estimates that the cost of transmitting a signal from Ward Peak to Indian Jack Road would be at least $10,000, even if the signal from KNPB's translator, K54DA, together with a good preamplifier, did provide a good quality signal at Ward Peak. However, WestStar adds that the measurements that KNPB made November 9 were only taken once, instead of over a 24-hour period, as the Commission requires, no copy of the correction table which the station utilized has been provided to the system, nor were the weather conditions, the time of day, or the age of any of the equipment used specified (except for the signal strength meter). Finally, according to Mr. Mendes, KNPB's signal quality was ". . . poor, with significant ghosting."

7. In response, KNPB offers to supply WestStar with the equipment used during its November 9 tests on a permanent basis so that the system can commence carriage of its signal immediately, and it argues that factors such as the weather and the time of day are irrelevant in cases, such as this, where, with the appropriate reception equipment, the signal's strength is approximately 100 times the requisite strength. However, KNPB did thereafter submit the "Calibration Table" for the field strength meter utilized November 9, adding that the age of the signal generator used then was unknown, and that the tests were conducted between 3:00 p.m. and about 3:30 p.m. PST, in weather conditions of about 25 degrees with wind from the southwest at 20 MPH and 18" of snow on the ground.

DISCUSSION

8. When the Commission adopted its *Report and Order* in MM Docket 92-259, *supra*, it gave cable operators until May 30, 1993 to designate their principal headends and stated its belief that Congress intended that this selection be made by individual cable operators, provided that their choices were reasonable and not made merely to circumvent the rules. The Commission also enumerated several factors it intended to consider when evaluating a complaint from a noncommercial educational station concerning a cable system's designation of its principal headend. The Commission added that a cable operator would bear a "significant burden in demonstrating the reasonableness" of its headend designation if the site chosen did not serve the majority of its subscribers, or did not have the majority of the system's signal processing equipment, or if it were not the closest to the geographic center of the cable system. According to WestStar, its Indian Jack Road facility satisfies all three of these factors: it directly serves the system's subscribers; it is where the system has its signal processing equipment; and it is near the system's geographic center. We are, therefore, persuaded that WestStar has properly designated that location as its principal headend, despite its earlier error in stating in an prior pleading in this proceeding that Ward Peak was its principal headend. *See, Complaint of the Mississippi Authority for Educational Television against Time Warner Cable*, 9 FCC Rcd 3069 (1994). Moreover, it has previously been established that a cable operator is not responsible for the transportation of a station's signal to its principal headend by microwave. *See, Complaint of Family Stations, Inc. against Sonic Cable Television*, 10 FCC Rcd 1672, 1673 (1995).

9. Finally, as we explained in our prior decision herein, pursuant to Section 615(g)(4) of the Communications Act of 1934, as amended, cable operators are not required to transmit television signals that are of poor quality, which is generally interpreted as requiring a minimum signal level at the cable system's designated headend of -49 dBm for noncommercial VHF stations. WestStar's unrefuted test data demonstrate that KNPB's translator had "no measurable signal" on August 4, 1993 at the Indian Jack Road headend, and that the signal strength of the station itself on that day at that location measured between -92 dBm and -88 dBm. Furthermore, WestStar is not required by Commission rules to measure KNPB's signal at a nonprincipal headend, such as Ward Peak, even if the subject signal is currently received there. *Complaint of Family Stations*, 10 FCC Rcd at 1673. We are, thus, persuaded that WestStar has satisfactorily demonstrated that KNPB lacks sufficient signal quality at WestStar's designated headend on Indian Jack Road to be entitled to assert mandatory carriage rights on WestStar's cable system at Truckee, California.

ORDERING CLAUSES

10. Accordingly, our initial decision in *Complaint of Channel 5 Public Broadcasting, Inc. against WestStar Cable*, 8 FCC Rcd 4953 (1993), is hereby modified, and the complaint filed April 2, 1993 by Channel 5 Public Broadcasting Inc. (CSR-3799-M) IS DENIED.

11. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

California Oregon Broadcasting, Inc. CSR-4127-A

For Modification of Television Broadcast Station KOBI's ADI

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 1995; Released: August 1, 1995

By the Cable Services Bureau:

INTRODUCTION

1. In the captioned proceeding, California Oregon Broadcasting, Inc., licensee of Television Broadcast Station KOBI (NBC, Ch. 5) ("KOBI"), Medford, Oregon, has requested the Commission to include certain communities in Douglas County and Coos County within the Medford, Oregon "area of dominant influence" ("ADI") for the purpose of obtaining signal carriage rights on the cable systems serving those communities. The specific Douglas County cable communities subject to inclusion are: Roseburg, Winchester, Sutherlin, Oakland, Gardiner, Reedsport, Tenmile, Diamond Lake, Glide, Myrtle Creek, Riddle, Winston, Dillard, Canyonville, Drain, Yoncalla, Lookingglass, Elkton, and Glendale. The Coos County cable communities subject to inclusion are: Coos Bay, North Bend, Powers, Myrtle Point, Coquille, Bandon, and Hauser.[1]

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and non-cable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may

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[1] KMTR, Inc., licensee of Station KMTR-TV (NBC, Ch. 16)("KMTR-TV"), Eugene, Oregon, several months late and without a request for leave to file, filed an opposition to the petition that it asks the Commission to accept based on the contention that KOBI's petition did not appear on public notice. KMTR is incorrect, however, in its assertion that the petition did not appear on public notice. It is listed on the "Cable Television Service Registrations; Special Relief and Show Cause Petition" Public Notice Report No. 969. Accordingly, although the petition has been reviewed, it will not be treated as a timely filed or formal opposition.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADI's to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* non-cable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and non-cable homes, and significantly viewed surveys typically measure viewing only in non-cable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.*, when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. In its petition, KOBI asks the Commission to add certain communities in Douglas County and Coos County, Oregon to the Medford, Oregon ADI so that KOBI may assert must carry rights on the cable systems that serve those communities. To justify its request, KOBI states that it has served Douglas County cable subscribers since the 1950s, and that it has served Coos County cable subscribers since 1953-54. KOBI adds that it is presently carried on every cable system in Douglas County except for three, and that it is carried on every cable system in Coos County except for one system with a total of 60 subscribers. With respect to coverage and local service, KOBI states that its Grade B signal encompasses all of Douglas County and Coos County, and its Grade A signal includes the major community of Roseburg, which is situated in Douglas County. KOBI adds that to provide television signals to all homes in its Grade B, it has invested in two LPTV stations and two translators in Coos County and two LPTV stations and translators in Douglas County.

9. KOBI notes that it meets the local programming needs of Douglas County and Coos County in a variety of ways, including local news and sports coverage as well as live coverage of events in the state capital of Salem. In addition, KOBI airs an average of four news stories from Douglas County every weekday and thirteen stories a week concerning events and happenings in Coos County. It also maintains a news bureau in Douglas County and an operational studio in Coos County. With regard to other stations in the area, KOBI states that there are two licensees in Douglas County: KPIC (CBS, Ch. 4) and KMTX-TV (NBC, Ch. 46), both Roseburg, Oregon and two licensees in Coos County: KCBY-TV (CBS, Ch. 11) and KMTZ (NBC, Ch. 23), both Coos Bay, Oregon. As for local viewing patterns, KOBI

[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[7] 8 FCC Rcd at 2977 (emphasis in original).
[8] *Id.* and n.139.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.

maintains that it is the second most viewed station in the counties. According to Nielsen, KOBI received a 74 cume in Coos County and a 70 cume in Douglas County' in 1993.

ANALYSIS AND DECISION

10. KOBI has provided sufficient evidence to justify its market modification request and it will accordingly be granted. Turning to the factors specified in the 1992 Cable Act, we find that KOBI has met the requisite statutory elements with its audience measurement being particularly notable. The viewing pattern data in cable and non-cable households demonstrates that KOBI has a strong marketplace presence in Douglas County and Coos County. The station has a 67 percent net weekly circulation in cable and non-cable households in Douglas County and a 70 percent net weekly circulation in Coos County.[11] Its viewing share in Douglas County is 14 percent and its share in Coos County is 13 percent.[12] With respect to coverage and local service to the cable communities, we believe that KOBI has shown that it provides area cable subscribers with locally oriented programming, including coverage of state and local political news along with sports and other community-specific human interest stories. A detailed programming and news log provided by KOBI supports this conclusion. Finally, KOBI has shown that it places a Grade B contour or better over Douglas County and Coos County and has made a considerable investment in its efforts to boost the reach of its signal.[13]

11. With respect to historical cable carriage patterns, KOBI states that it is carried on virtually every cable system in Douglas and Coos Counties. Independent data from past editions of the *Television and Cable Factbook* confirm the pattern of KOBI's cable carriage and that it has been carried in virtually all the cable communities that it asked to be added to the Medford ADI.[14] Although carriage did not take place in four communities, we will nevertheless modify KOBI's market to include all of the requested cable communities because the station has made a strong showing that the areas in question are logically within its market in terms of viewing data and service as well as in terms of the general pattern of historical cable carriage.

12. We also recognize that there are other licensees that provide local service to residents in Douglas County and Coos County. However, the presence of other commercial stations in the communities to be added to a particular ADI should not be a bar to granting the modification request particularly where, as here, the petitioning station has made a successful showing with regard to the other statutory criteria. Thus, the third statutory criterion is not a barrier to the requested action in this case.[15]

ORDER

13. Accordingly, IT IS ORDERED, pursuant to §614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed October 6, 1993 by California Oregon Broadcasting, Inc. IS

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[11] *See* Arbitron's Television County Coverage for 1993. These data are county-based, rather than community-specific. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data are acceptable as probative, although not conclusive, in cases of this type.

[12] *See id.*

[13] The Commission has held that Grade B coverage demonstrates service. *See MM Docket 92-259*, 8 FCC Rcd at 2977.

[14] Thus, for example, according to the *TV Factbook* for the years 1989-1993, KOBI was carried on the following cable systems (and their predecessors) in the following communities: (1) Falcon Cablevision serving Bandon, Coos Bay (which also serves North Bend), Coquille, Hauser, Myrtle Point, and Powers, all in Coos County; (2) Falcon Cablevision serving Drain (which also serves Yoncalla) and Sutherlin (which also serves Oakland) in Douglas County; (3) Jones Intercable serving Canyonville, Myrtle Creek (which also serves Riddle), and Winston (which also serves Dillard) in Douglas County; (4) Cooke Cablevision serving Roseburg in Douglas County; and (5) Sun Country Cable (now Phoenix Cablevision of Oregon) serving Glendale in Douglas County. Glide Cablevision serving Glide in Douglas County carried KOBI in 1991, 1992 and 1993 but that this system is not listed in the *Factbook* for 1989 and 1990. Similarly, the *Factbook* lists Interstate Cable serving Lookingglass in Douglas County as carrying KOBI's signal in 1991, 1992, and 1993 but that this system is not listed in the *Factbook* for 1989 and 1990. Moreover, Interstate Cable's system serving Elkton in Douglas County carried KOBI in 1992 and 1993 but that this system is not listed in the *Factbook* for 1989, 1990, and 1991. We attribute the absence of the communities in the *Factbook* to the fact that these systems are newly franchised with the Glide system entering the marketplace on January 31, 1989, the Lookingglass system beginning service on September 1, 1990, and the Elkton system beginning service on July 1, 1991. Nevertheless, KOBI has been carried since the time these systems entered into service and, as such, consider the station to be historically carried in these instances. With regard to Diamond Lake, which does not appear to be served by any cable system for the years 1989-1994, we assume that this community, being the only one unaccounted for, is being served by another cable system not explicitly listed in the *Factbook*.

[15] As indicated, note 2 *supra*, we have informally reviewed KMTR-TV's opposition. KMTR-TV asserts that KOBI's modification request abuses Commission processes because the petition was filed not with the intent of adding communities to its ADI but was designed to disrupt the retransmission consent negotiations between KMTR-TV and the Eugene ADI cable systems. With respect to this argument, we find no evidence that KOBI used the Commission's procedures in an illegal or questionable manner when it filed its petition. KOBI was acting to protect its historically carried signal and avoid subscriber disruption that would occur if the cable systems had to drop the signal. KMTR-TV also asserts that KOBI's petition would destroy the local character of the Eugene ADI, because adding the large counties of Douglas and Coos County would effectively create a regional market which KOBI would partly dominate because of its ownership interest in a number of local translators and LPTV stations, as well as a 50% stake in Roseburg licensee, KPIC. We find no merit in this argument because the communities in question are simply being added to KOBI's market and are not being permanently removed from the Eugene ADI. Finally, KMTR-TV argues that the grant of KOBI's request would be "fruitless" because the station would not be entitled to carriage on the relevant cable systems since KMTR-TV's satellite stations KMTX-TV and KMTZ-TV are geographically closer to the principal headends than is KOBI and because the local cable operators are not required to carry more than one local NBC affiliate. We believe that the presence of closer affiliates does not render the request fruitless unless both sets of affiliates select to proceed under must carry rather than the retransmission consent requirements, and the cable system chose to carry only one of the affiliates both during the present election cycle and in the future.

GRANTED. This change shall be effective in accordance with the following schedule: California Oregon Broadcasting, Inc., shall notify the relevant cable systems in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 60 days of such notification.

14. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Scripps Howard Cable Company — CUID No. SC0012 (Newberry)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1995; Released: August 1, 1995

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint in the franchise area which is the subject of this Order was completed and served on Operator on November 8, 1993 and received by the Commission on November 15, 1993. Operator filed FCC Form 393 in response.

5. In its benchmark filing, Operator calculated a maximum permitted rate for the CPS tier of $13.08 per month (plus franchise fee). However, Operator's actual monthly charge for the CPS tier was $13.58 (plus franchise fee). Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's submission, we have found that Operator miscalculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in its Form 393:

a. Operator incorrectly calculated its benchmark rate as of the initial date of regulation on Form 393, Part II, Worksheet 1, Line 121. The instructions to Form 393 permit an operator to calculate its benchmark channel rate using either the benchmark formula or the benchmark tables. Under either method, however, the benchmark figure that Operator entered on Line 121 does not agree with the number of regulated channels, satellite channels, and subscribers reported by Operator. Accordingly, using the data reported by Operator, we changed Line 121 to 0.673, the figure yielded by the benchmark formula.

b. On its Form 393 filing, Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of December 1993. However, Operator cannot permissibly calculate inflation through the end of December 1993. In general, a cable operator must submit a justification of its rate no more than 30 days after service of the earliest valid complaint.[11] Based on the service date of the earliest valid complaint for the franchise area, Operator was required to file a rate justification no later

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See* 47 C.F.R. § 76.956(a).

than December 8, 1993. If Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through November 1993.[12] Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Operator should have filed Form 393.[13] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through November 1993, the base date Operator should have used in justifying its rate, of 1.032.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $13.03 per month (plus franchise fee) for the period from November 15, 1993 to May 14, 1994.[14]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise area referenced in the caption that portion of the amount paid for cable programming service for the period from November 15, 1993[15] to May 14, 1994 which exceeded the maximum price of $13.03 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $13.03 (plus franchise fee).[16]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[14] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[16] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Port Townsend Cable TV Limited Partnership d/b/a Summit Cablevision — CUID No. WA0203 (Chelan)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1995; Released: August 1, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon the filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994 against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. §543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Complaint of Citrus County Association for Retarded Citizens against Mickelson Media, Inc. d/b/a Century Cable — CSR-4227-M

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1995; Released: August 1, 1995

By the Cable Services Bureau:

1. On January 19, 1995, a petition for reconsideration was filed on behalf of the Citrus County Association for Retarded Citizens ("CCARC"), licensee of low power television station W49AI, Inglis-Yankeetown, Florida. CCARC requests that the Commission reconsider its January 19, 1995 action which denied CCARC's must carry complaint against Mickelson Media, Inc. d/b/a Century Cable ("Century").[1] An opposition to this petition has been filed by Century, to which CCARC has replied.

2. In support of its request, CCARC states that in the second set of signal quality tests performed by Century on W49AI's signal, purportedly in compliance with Commission criteria, Century used an "all channel" receiving antenna intended for "suburban range" reception. CCARC argues that for other UHF signals, Century uses UHF-only antennas mounted considerably higher which are equipped with preamplifiers to overcome high-line losses. Petitioner contends that the antenna used in W49AI's test was not only mounted below every other UHF antenna, but it was connected to high-loss RG-6 coaxial cable with no preamplification to overcome cable loss. While CCARC is aware that the Commission does not specify which type of antenna can be used, it does require measurements to be made with "generally accepted equipment that is currently used to receive signals of similar frequency range, type or distance from the principal headend."[2] CCARC avers that Century has clearly not followed this requirement, and maintains that since W49AI's signal measurement was only 5.5 dB below the -45 dBm minimum, the use of "generally accepted equipment" would eliminate the deficiency and even raise the signal level above the minimum. Indeed, CCARC points out, the prior owner of this system successfully carried W49AI's signal using the same headend.

3. In its opposition, Century states that CCARC has simply repeated the same arguments which it raised in its original complaint, arguments which were previously rejected. Moreover, maintains Century, CCARC has not presented any supporting evidence that the Commission's original decision was in error. Further, in a subsequent declaration,[3] Century avers that: 1) the photograph submitted by CCARC in its reconsideration as the one used in the signal quality test for W49AI is wrong -- the actual test antenna is no longer on the tower; 2) only one UHF station (Channel 44) uses a preamp and this was provided by the station itself to improve the quality of the signal; and 3) Century conducted numerous signal quality tests in 1994 and no other station has questioned the validity of its methods.

4. CCARC filed a motion to strike the declaration filed by Century, stating that the supplement was untimely and unauthorized and that Century provides no explanation as to why it took four weeks from the filing of its opposition to supply the subsequent information. Should the filing be considered, however, CCARC argues that the matters raised therein are irrelevant. It maintains that despite the fact that Century claims the test antenna was removed, the system avoids mentioning that the removed antenna was precisely as described in CCARC's reconsideration petition, and that it in no way resembles the type of antenna used by Century to receive Channel 44.[4] In addition, CCARC states that Century provides no refutation of the fact that when CCARC was relaying the signal of Television Broadcast Station WOFL (Ind., Channel 35), Orlando, Florida, that signal was carried on the Dunnellon system on the same tower and provided a good quality signal. The only difference since then, avers CCARC, other than the change in ownership of the cable system, is the difference in CCARC's programming. It contends that since that time its station has had no reduction in power, no lowering of antenna HAAT and no modification of its directional antenna pattern. CCARC concludes, therefore, that it is solely program content and not technical factors which account for Century's contrived measurements and refusal to carry its signal.

5. Century's opposition to the motion to strike states that as soon as it became aware that CCARC had submitted false and misleading information, it had an obligation to inform the Commission of that fact and it did so in its declaration. Therefore, CCARC's efforts to strike the declaration, and prevent disclosure of the fact that it used inaccurate evidence, should be rejected. This is especially important, argues Century, since its declaration emphasized one basic point -- that the antenna photographed by CCARC was *not* the antenna used in the signal quality test for W49AI.

6. We are not persuaded by the arguments raised by CCARC. While CCARC relies on the *Clarification Order's* requirement that currently non-carried stations be measured to the extent possible using equipment currently used to receive similar signals, it should be noted that this same

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[1] *Complaint of Citrus County Association for Retarded Citizens against Mickelson Media, Inc., d/b/a Century Cable*, 10 FCC Rcd 960 (1995).

[2] *See Clarification Order in MM Docket No. 92-259*, 8 FCC Rcd 4142, 4143 (1993).

[3] Declaration of Mark Beaubien, Chief Technician of Century Cable, Dunnellon, Florida.

[4] CCARC described the antenna as a "channel master 5646 Broadband antenna . . . located 120' above ground" with 140 feet of "RG-6 type downlead." The antenna used by Century to receive Channel 44 is described as a professional cut-to-channel "special high-gain antenna with preamplifier."

order specifies that "cable operators need not employ extraordinary measures or specialized equipment when making measurement for stations that are not currently carried."[5] While there appears to be some disagreement between the parties as to the actual type of antenna used in the signal quality test of W49AI's signal, staff analysis of the information provided does not indicate that the type of antenna, as presented by CCARC, was in any way inferior. Moreover, it should be noted that only one of the UHF stations carried by Century apparently uses a preamplifier in the reception of its signal and that equipment was provided by the station itself apparently to improve the quality of its signal. This is apparently not the usual condition of carriage for UHF stations on the Century system. While the use of a preamplifier may indeed improve the reception of W49AI's signal, as pointed out in our original order, a low power station such as W49AI cannot avail itself of this avenue as neither the 1992 Cable Act nor our rules allows a low power station to cure a signal quality deficiency with additional equipment as full power television stations are allowed to do.[6] Finally, with regard to the acceptance of Century's declaration, while it is true that the declaration was late-filed, we will accept it in the interest of a complete record.

7. In light of the above, therefore, pursuant to 1.106 of the Commission's Rules, the petition for reconsideration, filed January 19, 1995, by the Citrus County Association for Retarded Citizens, Inc. IS DENIED.

8. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[5] 8 FCC Rcd at 4143 n.11.
[6] *Report & Order in MM Docket No. 92-259*, 8 FCC Rcd 2965 (1993) at paragraph 104.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

VSC Communications Inc., CSR-4099-A
Shreveport, LA

For Modification of Television
Broadcast Station KSLA's ADI

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1995; Released: August 1, 1995

By the Cable Services Bureau:

INTRODUCTION

1. VSC Communications Inc. ("KSLA"), licensee of television station KSLA-TV, Shreveport, Louisiana (CBS, channel 12), has filed the captioned petition for special relief seeking to include communities in Gregg and Rusk Counties, Texas within the Shreveport-Texarkana, Louisiana "area of dominant influence" ("ADI") for purposes of the cable television mandatory broadcast signal carriage rules.[1] No oppositions to this petition have been filed. The petitioner filed letters supplementing its request on June 8, 1995 and June 28, 1995.

BACKGROUND

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its *Report and Order*, Docket 92-259,[3] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] *See* Appendix A for a list of the communities at issue in this proceeding ("the Communities").

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] *Report and Order*, MM Docket 92-259, 8 FCC Rcd 2965, 2976-2977 (1993) ("*Must Carry Order*").

[4] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in Section 73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated Section 73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, see Arbitron's *Description of Methodology*.

[6] Communications Act of 1934, as amended, § 614 (h)(1)(C)(ii), 47 U.S.C. § 534(h)(1)(C)(ii).

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided guidance in its *Report and Order in Docket 92-259, supra,* to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[11] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights; simply provide the system operator with an expanded list of must-carry signals from which to choose, i.e., when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

MARKET FACTS AND PETITIONER'S ARGUMENTS

8. The communities at issue in this proceeding are located in Gregg and Rusk Counties, Texas, which are part of the Tyler-Longview-Jacksonville, Texas ADI. KSLA is located in Shreveport, Louisiana in the Shreveport-Texarkana, Louisiana ADI. Gregg and Rusk Counties are contiguous to each other and border the Shreveport-Texarkana ADI to the southwest. The petitioner states that Gregg and Rusk Counties were previously included in the Shreveport-Texarkana ADI. In its petition, KSLA asks the Commission to modify the Shreveport-Texarkana ADI to include communities in Gregg and Rusk Counties for purposes of the cable television mandatory broadcast signal carriage rules.

9. KSLA asserts that it satisfies each of the four market modification criteria set forth in the 1992 Cable Act and the Commission's rules. The petitioner states that it has been historically carried on the various cable systems serving the Communities. Specifically, KSLA indicates that it has been historically carried on cable systems serving all of the communities in Gregg County.[12] With respect to Rusk County, the petitioner states that the largest cable systems in the county historically have carried KSLA.[13] The petitioner acknowledges, however, that Friendship Cable of Texas-East, serving Price and Reklaw, Texas does not carry KSLA. The petitioner maintains that it provides coverage and local service, including news, weather and sports coverage, to the Communities. KSLA provides Grade B contour coverage to all of the communities in Gregg County and to the communities at issue in Rusk County, with the exception of Reklaw.[14] The petitioner points out that the largest city in the two counties, Longview in Gregg County, is within the station's Grade A contour. In addition, the petitioner provides a list of over 100 specific news stories aired between 1990 and 1993 which, it claims, either covered events in Gregg County, Rusk County, or were of importance to residents of East Texas generally. The petitioner adds that Gregg and Rusk Counties are included in KSLA's daily weather coverage and that the station covers high school sporting events in the two counties. In addition, the petitioner asserts that it has aired several features

[7] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 97 (1992).
[8] *Id.* at 2977 (emphasis in original).
[9] Must Carry Order, 8 FCC Rcd at 2977, n.139.
[10] 47 C.F.R. § 76.59.
[11] *Must Carry Order,* 8 FCC Rcd at 2981.
[12] *See* Appendix A.
[13] *Id.*
[14] *Television and Cable Factbook,* Vol. 62, p. A-559 (1994).

on businesses which are based in Gregg County or Rusk County. As to the issue of whether other stations entitled to mandatory carriage provide local coverage to the communities in question, KSLA contends that it is the only CBS affiliate effectively serving the Communities. The petitioner explains that KSLA became the "de facto" CBS affiliate for the Communities after former CBS affiliate, KLMG(TV) in Longview, Gregg County, dropped its CBS affiliation in 1991 due to the strength of KSLA and KSLA's viewership in Gregg and Rusk Counties. The petitioner maintains that because of its signal coverage and the fact that it is the only nearby CBS affiliate, KSLA achieves high viewership ratings. KSLA argues that local viewing patterns justify inclusion of the Communities in the Shreveport-Texarkana ADI. The petitioner submits Arbitron cable county and noncable county coverage reports for 1993-1994, 1992-93, and 1991-92 which, it contends, demonstrate that the station achieves high ratings in cable and noncable homes in both Gregg and Rusk Counties. The petitioner also asserts that KSLA is significantly viewed in Gregg and Rusk Counties.

ANALYSIS AND DECISION

10. We shall grant KSLA's petition with respect to all of the communities in question except for Reklaw in Rusk County, Texas. KSLA has presented sufficient evidence regarding all of the Communities, except for Reklaw, that its request for market modification complies with the four statutory elements. The station has been continuously carried on cable systems serving most of the Communities since 1986 or 1989.[15] Although KSLA has not been carried historically on the cable system serving the community of Price in Rusk County, Texas, we find that the combination of other factors, such as Grade B contour coverage and substantial viewership, makes the case for inclusion of Price in the Shreveport-Texarkana ADI. KSLA places a Grade B contour over all of Gregg County and most of Rusk County, including Price, and a Grade A contour over Longview, the largest city in the two counties. With respect to local service, KSLA has demonstrated that it provides locally-oriented programming to the Communities. A list of over 100 news stories aired between 1990 and 1993 covering events in Gregg County, Rusk County or East Texas generally supports this conclusion. It also appears that KSLA is the only CBS affiliate serving Rusk County and the most watched CBS affiliate, by far, in Gregg County.[16] While stations other than KSLA may offer local programming to the Communities, we do not believe that Congress intended for the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. As to viewing patterns, the most recent Arbitron county coverage reports (1993-94) confirm KSLA's assertion that it achieves substantial viewership. They show that KSLA is the second most watched station in both Gregg and Rusk Counties. Specifically, in Gregg County, KSLA garners a total viewing share of 15 and a net weekly circulation of 79 and, in Rusk County, the station receives a total viewing share of 17 and a net weekly circulation of 80.[17]

11. KSLA has failed to support its request for market modification with respect to the community of Reklaw in Rusk County, Texas. The cable system serving Reklaw, has not carried KSLA historically and the station's Grade B contour does not encompass Reklaw. Because this community is in an area that is approaching the core of the Tyler-Longview-Jacksonville market area (being almost directly between Jacksonville and Lufkin, another community of license in the market), it is particularly important the requested change not be granted with respect to this community unless fully jusitified based on the applicable factors. Therefore, we deny the petitioner's request to include Reklaw within the Shreveport-Texarkana ADI.

ORDER

12. In view of the foregoing, we find that grant of KSLA's petition with respect to all of the communities in question, excluding Reklaw in Rusk County, Texas, is in the public interest.[18]

13. Accordingly, IT IS ORDERED, pursuant to Section 614(h)(1)(C) of the Communications Act of 1934, as amended, (47 U.S.C. 534(h)(1)(C)) and Section 76.59 of the Commission's Rules (47 CFR Section 76.59), that the petition for special relief (CSR-4099-A), filed September 2, 1993 by VSC Communications Inc. IS GRANTED to the extent indicated in paragraph 12, *supra*, and in all other respects IS DENIED. KSLA shall notify the relevant cable systems in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within sixty (60) days of such notification.

14. This action is taken by the Cable Services Bureau pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[15] *See* Appendix A.

[16] Arbitron's 1993-1994 *Television County Coverage* (Standard/Fringe- including both cable and noncable viewing): Texas.

[17] *Id.*

[18] The Communities also remain within the Tyler-Longview-Jacksonville, Texas ADI.

Appendix A

County	Cable System	Historic Carriage	Communities
Gregg, TX	Gladewater-White-Oak Cable TV Cablevision Inc.	1986	Gladewater, Clarksville City and White Oak
		1989	Liberty City, Warren City, and Union Grove
	Longview Cable TV Co.	1986	Longview
	Friendship Cable of Texas-East	1991	Gladewater, Kilgore
		1992	Lansing
	Friendship Cable of Texas-East or Galaxy Cablevision	1986	Lakeport, Elderville, and Lake Cherokee
	Kilgore Cable TV Co.	1986	Kilgore
Rusk, TX	Henderson Cable TV	1986	Henderson and surrounding unincorporated areas of Rusk County
	Galaxy Cablevision	1986	Lake Cherokee, Overton, and Tatum
		1992	Laneville
	Friendship Cable of Texas-East	1991	Kilgore
		___	Price and Reklaw*

* KSLA is not carried to these two communities. The communities of Price and Reklaw are served by Friendship Cable of Texas-East.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	CUID Nos. GA0064 (City of Calhoun)
	GA0167 (City of Montezuma)
Scripps Howard Cable	GA0189 (City of Tallapoosa)
Company	GA0241 (City of Chamblee)
Withdrawal of FCC Form 329	GA0304 (City of Dallas)
Rate Complaints	GA0311 (City of Social Circle)
	GA0342 (City of Louisville)

MEMORANDUM OPINION AND ORDER

Adopted: July 21, 1995; Released: August 1, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Complaints with this Commission were filed by local franchising authorities ("LFAs") in the above-referenced Georgia communities alleging that the prices charged by Scripps Howard Cable Company ("Scripps Howard") for cable programming service tier ("CPS") services in those communities were unreasonably high. In June and July of 1995, the LFAs wrote to the Commission stating that they wished to withdraw their complaints in these communities.[1] In each of the communities, the LFA was the only complainant that filed a valid complaint with this Commission. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. The withdrawal of the only complaint against an operator's CPS rates in a community constitutes the termination of our jurisdiction to regulate those rates. We will allow the withdrawal of these complaints, and our review of these filings will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8]

4. This Commission has now received from the LFA in each community a letter stating that it wishes to withdraw its CPSrate complaint against Scripps Howard. Under our rules, this Commission's authority to regulate CPS rates arises when a valid complaint against those rates is filed. In every community referenced above, the LFA is the only complainant. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[9] While our rules forbid collusive agreements between operators and local franchising authorities regarding forebearance from rate regulation, there is no evidence of any such agreements here. We will accordingly allow the LFAs to withdraw their complaints. Because our review of the rate justification showings is predicated on the existence of a rate complaint, we are terminating our review of Scripps Howard's filings in the above-referenced communities.

5. Accordingly, IT IS ORDERED that permission to withdraw the FCC Form 329 rate complaints against cable programming service rates in the above-noted communities IS GRANTED, and the review of the resulting rate justification filings IS TERMINATED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] Letter from Cathy Harrison, City of Calhoun, to Meredith Jones, FCC (June 19, 1995); letter from David Peaster, City of Montezuma, to Meredith Jones, FCC (June 23, 1995); letter from Mayor William Bridges, City of Tallapoosa, to Meredith Jones, FCC (June 22, 1995); letter from Mayor Johnson W. Brown and Joe Fowler, City of Chamblee, to Meredith Jones, FCC (June 22, 1995); letter from Mayor Jeffrey B. Miller, City of Dallas, to Meredith Jones, FCC (June 22, 1995); letter from Mayor Frank W. Sherrill, City of Social Circle, to Meredith Jones, FCC (July 7, 1995); letter from Mayor Julian L. Veatch, City of Louisville, to Meredith Jones, FCC (July 3, 1995).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*"Benchmark Order"):* 47 C.F.R. § 76.922(b).

[7] *See Benchmark Order*, 9 FCC Rcd at 4190, paras. 150-152.

[8] *Id.*

[9] Conference Report on the Cable Act of 1992, at 62. *See also*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5669 (1993) *(Rate Order)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Star Cal ssociates CUID No. OH2082 (Nelson, OH)

Complaint Regarding Cable
Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 1995; Released: August 1, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider a complaint about the price Star Cable Associates ("Star Cable") was charging for its cable programming service ("CPS") tier in the Township of Nelson, Ohio. Star Cable filed a motion to dismiss the complaint arguing that it is subject to effective competition and thus its cable programming service rate is not subject to regulation by the Commission.[1] Star Cable did not file a rate justification as required by the Commission's Rules.[2]

2. The complaint regarding Star Cable's CPS rate for the Township of Nelson was filed with the Commission on September 27, 1993. In response to the complaint, Star Cable filed a motion to dismiss on November 17, 1993.

DISCUSSION

3. In its motion to dismiss, Star Cable asserts that its cable system is subject to effective competition, and therefore its cable programming service rate is not subject to rate regulation, because it serves fewer than 30 percent of the households (*i.e.*, occupied housing units)[3] within its franchise area, the Township of Nelson.[4] Specifically, Star Cable claims that in October 1993, it served a total of 259 subscribers, or 27 percent of the 942 households in the Township of Nelson. As supporting documentation, Star Cable submits a copy of the relevant 1990 Census data which shows that there are 942 households in the Township of Nelson. In addition, Star Cable provides a computer print-out as of October 1993 with sufficient subscriber information to support its claim that it served 259 households in the franchise area. Finally, Star Cable includes an affidavit by a responsible official certifying the accuracy of the data presented in the motion.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[5] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[6] Star Cable has met this burden. Star Cable appropriately relied on data reflecting the number of households as required by our rules.[7] Relying on this data, Star Cable submitted sufficient evidence demonstrating that, at the time the CPS complaint was filed, its cable system served 259 of the 942 households, or 27 percent of the households, within the Township of Nelson. Thus, we find that Star Cable's system serving the Township of Nelson is subject to effective competition, and we will therefore grant the motion to dismiss the complaint filed against the CPS rate in that franchise area.

CONCLUSIONS

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the motion of Star Cable Associates to dismiss the complaint against its cable programming service price charged in Nelson, Ohio, CUID No. OH2082, IS GRANTED.

6. IT IS FURTHER ORDERED that the complaint against the cable programming service price charged by Star Cable Associates in Nelson, Ohio, CUID No. OH2082, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] 47 C.F.R. § 76.905.

[2] 47 C.F.R. § 76.956; *see also* Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752, para. 3(1) (Cab. Serv. Bur. 1994).

[3] As the Commission noted recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." Third Order on Reconsideration, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*Third Recon. Order*). The term "household" is defined by the Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[4] The Communications Act of 1934, as amended (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's Rules (47 C.F.R. § 76.905 (a)) provide that only rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. The Communications Act of 1934, (Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)) and the Commission's Rules (47 C.F.R. § 76.905 (a) and (b)(1)).

[5] 47 C.F.R. § 76.906.

[6] *Cf.* 47 C.F.R. § 76.911(b)(1) (setting forth standards governing petitions for reconsideration of local franchising authority's certification).

[7] *See Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Family Stations, Inc. against Sonic Cable Television — CSR-4274-M

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1995; Released: August 2, 1995

By the Cable Services Bureau:

1. On March 20, 1995, a petition for reconsideration was filed on behalf of Family Stations, Inc., licensee of Television Broadcast Station KFTL (Ind., Channel 64), Stockton, California, requesting that the Commission reconsider its February 7, 1995 action which denied KFTL's must carry complaint against Sonic Cable Television ("Sonic"), operator of cable systems serving Loyalton, Portola, Graeagle, and Greenville, California.[1] An opposition to this petition was filed April 3, 1995 on behalf of Sonic, to which KFTL has replied.

2. In support of its request, KFTL states that the Commission erred in not requiring Sonic to perform the signal quality tests of its station at Sonic's Mills Peak, California site instead of at Sonic's four designated principal headends located at Loyalton, Portola, Graeagle, and Crescent Mills.[2] KFTL argues that since Mills Peak is the primary signal reception site for all Stockton/Sacramento signals due to an intervening mountain range the signal measurements taken by Sonic at its principal headends are not a true reflection of KFTL's signal quality. It points out that Stockton/Sacramento stations are received only at the Mills Peak site and then transmitted via microwave to Sonic's principal headends. The Commission's acceptance of the use of Sonic's four principal headends as test sites, it avers, has allowed Sonic to circumvent the Commission's requirement that the signal level measurements for KFTL be made using the same signal reception methods as those employed to receive other Stockton/Sacramento signals.[3] Indeed, in a recent Commission decision, the Commission ruled that a signal quality measurement taken at 25 feet at the system's principal headend was unacceptable not only because it was below the treeline of 65 feet, but also because all other television signals from the same market area were received at an antenna height of 70 feet.[4] In the case herein, KFTL argues that the situations are substantially similar, with the exception that the natural obstruction is not a treeline but a higher elevation and/or a different test location, and that therefore "good engineering practices" would require a new test. Finally, KFTL maintains that the Commission's original decision in this case runs counter to the intent of the 1992 Cable Act which supports the carriage of local stations within their own market.

3. Sonic's opposition argues that KFTL does not raise any valid grounds for reconsideration of its complaint, but is only seeking to evade the Commission's rules which require signal quality tests at a system's principal headend. It points out that KFTL erroneously asserts that the Mills Peak site is the only location where Sonic receives off-air broadcasts of the Stockton/Sacramento signals. In point of fact, states Sonic, its Crescent Mills headend site, which serves the community of Greenville, receives four broadcast signals over-the-air from Stockton/Sacramento.[5] Further, Sonic maintains that KFTL has provided no engineering data to support its contention that its signal can be received at the Mills Peak facility within the required parameters.[6] To require Sonic to test at a nonprincipal headend when it has already correctly conducted tests at its principal headend sites, states Sonic, would be contrary to the Commission's ruling that a cable system can have only one "principal headend." Finally, Sonic avers that KFTL's reliance on prior Commission decisions is inappropriate. Both the *Clarification Order* and the decision in *Time Warner* specify the use of the "principal headend" when requiring the use of similar equipment or retesting. Neither decision can therefore be used as an exception to the Commission's rules in allowing the use of a nonprincipal headend.

4. In reply, KFTL states that the fact that Sonic's Crescent Mills headend receives Stockton/Sacramento signals over-the-air does not eliminate Sonic's obligation to retest KFTL's signal at the Mills Peak site for its other systems.[7] KFTL argues that the fact that Sonic states that it has complied with the Commission's rules in conducting its tests at its principal headends is irrelevant since the proper test site in this instance is the Mills Peak facility. Until such tests are performed, avers KFTL, Sonic has no basis to deny carriage of its signal. Further, KFTL reinforces its reliance on the *Clarification* which states at paragraph 8 that "Where . . . measurements were made at a designated headend that is not the current reception location (headend) for the broadcast signals, we expect the cable operator to follow good engineering practices for the measurement of the broadcast signals in question." It maintains that Sonic has failed to meet this requirement since it has not used the same mountain top receiving unit and micro-

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[1] *Complaint of Family Stations, Inc., against Sonic Cable Television*, 10 FCC Rcd 1672 (1995).

[2] Crescent Mills is the headend site which serves the community of Greenville, California.

[3] KFTL cites paragraph 8 of the *Clarification Order in MM Docket No. 92-259*, 8 FCC Rcd 4142 (1993), which states that the signal level tests on broadcast stations not previously carried be based on measurements made with equipment that is "currently used to receive signals of similar frequency, range, type, or distance from the principal headend." *Id.* at 4143.

[4] *Time Warner Cable*, 10 FCC Rcd 936 (1995).

[5] Sonic indicates that its also receives KFTL at the principal headends of systems it serves in Woodland, West Sacramento, Dixon, Winters, Colfax, and Riverbank/Empire, California.

[6] In footnote 15 of its opposition to KFTL's original complaint, Sonic indicated that it conducted preliminary tests of KFTL's signal at Mills Peak, and that the station only achieved a signal level of -74.75 dBm.

[7] KFTL indicates that it would be appropriate to retest its signal for the Crescent Mills system at that headend site and that KFTL is willing to do so.

wave transmission path used in receiving the other Stockton/Sacramento stations. Finally, KFTL avers that the *Time Warner* decision only emphasizes the Commission's holding that "good engineering practices" requires cable operators to measure non-carried stations in a manner which approximately duplicates already carried signals. KFTL contends that this requires either that its signal be retested at either the Mills Peak and Crescent Mills sites or, if the principal headends are used, that the receiving equipment used be sufficient to approximate the receiving conditions at the actual receive sites.

5. We are not persuaded by the arguments raised by KFTL. Section 614(h)(1)(B)(iii) of the Communications Act of 1934, as amended, states that a local commercial must carry station shall not include "a television broadcast station that does not deliver to the principal headend of a cable system either a signal level of -45 dBm for UHF signals or -49 dBm for VHF signals . . . ." Further, as stated in the *Clarification Order* at paragraph 8, "As the statute specifies that a broadcast station must deliver a good quality signal to the principal headend of the cable system to be entitled to must-carry rights, we clarify that the designated principal headend is the appropriate location for such measurements."[8] The concept of principal headend is statutorily-mandated and is, therefore, not something which can be arbitrarily changed at either the discretion of the cable operator or this Commission. As a result, the use of the Mills Peak facility as a test site for KFTL's signal would not be in compliance with either the 1992 Cable Act or the Commission's rules. Moreover, while KFTL relies heavily on the *Clarification Order's* requirement that currently non-carried stations be measured to the extent possible using equipment currently used to receive similar signals, it should be noted that this same order specifies that "cable operators need not employ extraordinary measures or specialized equipment when making measurement for stations that are not currently carried."[9] The use of separate reception and microwave transmission equipment would fall within this category of extraordinary measures, particularly in light of the fact that KFTL is apparently capable of being received at several headend locations served by Sonic. KFTL can, if it so chooses, retest its signal at any of the designated principal headend locations specified by Sonic using whatever equipment it feels necessary to ensure a good quality signal. Such equipment, however, must be supplied by KFTL.

6. In light of the above, therefore, pursuant to §1.106 of the Commission's Rules, the petition for reconsideration, filed March 20, 1995, by Family Stations, Inc. IS DENIED.

7. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[8] 8 FCC Rcd at 4143.
[9] *Id.* at 4143 n.11.

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 95-102

In the Matter of

Amendment of Part 95 of the Commission's Rules to Establish a very short distance two-way voice radio service — RM-8499

NOTICE OF PROPOSED RULE MAKING

Adopted: June 22, 1995; Released: August 2, 1995

Comment Date: October 2, 1995
Reply Comment Date: October 16, 1995

By the Commission:

I. INTRODUCTION

1. In this *Notice of Proposed Rule Making* (*Notice*), we propose to establish a very short distance, unlicensed, two-way voice radio service in the Ultra High Frequency (UHF) portion of the radio spectrum by amending the rules for the Personal Radio Services (47 C.F.R. Part 95). This proceeding was initiated by a petition for rule making (petition), RM-8499, filed by the Radio Shack Division of Tandy Corporation (Tandy), on July 20, 1994.[1]

2. Tandy states that there is a burgeoning public demand for an affordable and convenient means of direct, short-range, two-way voice communication among small groups of persons.[2] It requests that we authorize fourteen UHF channels for a new service which it calls the Family Radio Service (FRS). It would share seven General Mobile Radio Service (GMRS) channels that are not used for repeater operation as well as utilize seven channels that are located between certain GMRS channels.[3] Motorola and the Telecommunications Industry Association (TIA) filed comments supporting the petition, while the Personal Radio Steering Group (PRSG), representing users of the GMRS, and a number of GMRS licensees filed comments in opposition.

II. DISCUSSION

3. In its petition, Tandy identifies a need by small groups of persons such as families for a good quality voice radio communication service having a very short range. The group members would use palm size radio units to communicate while on outings, such as visiting shopping malls and amusement parks, attending sporting events, camping, and taking part in other recreational activities.[4] Tandy states that many persons could benefit from such a service, particularly for personal security, due to the low cost of the units and their communication capability.[5] Other commenters agree there is an unmet need for a low cost, flexible, consumer grade radio communication alternative.[6]

4. Tandy envisions that such a Family Radio Service would use hand-held units transmitting a frequency modulation emission type. It says a service structured this way can meet the communications needs of small groups of individuals in a myriad of situations.[7] Tandy requests[8] that the units be authorized to transmit, on a secondary shared basis, on the seven GMRS lowpower non-repeater channels.[9] It also requests that FRS units be authorized to transmit on seven other channels, each located midway between the eight GMRS repeater transmitting channels.[10] Based on tests it has done, Tandy has determined that a maximum power of only one-half watt is adequate to provide good communications quality over a very short range, and that transmissions made at this very low power level will preclude interference potential to other stations.[11]

5. The Personal Radio Steering Group (PRSG), representing users of the GMRS, and REACT International, Inc., request that FRS be authorized on channels other than GMRS channels.[12] The PRSG states that mixing licensed and unlicensed users on the same channels is unworkable, and requests that the Commission continue to reserve the unused interstitial channels for future GMRS use.[13] Michael C. Trahos, a GMRS licensee, contends that use of the proposed channels will risk interference to GMRS systems.[14] Tandy filed reply comments reiterating the benefits of its proposed service and noting support from TIA and Motorola.

6. Motorola and the TIA agree there is a need for a low cost unlicensed very short distance two-way voice radio service,[15] and that technical standards can be crafted to adequately protect GMRS systems.[16] Motorola argues that

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[1] *See* Public Notice, July 26, 1994, Report No. 2023.
[2] Petition at 4.
[3] The General Mobile Radio Service is a personal radio service administered under Part 95 of the Commission's Rules. Its purpose is to facilitate the activities of licensees and their immediate family members. There are fifteen Ultra-High Frequency (UHF) channels consisting of eight channel pairs for repeater operation and seven interstitial non-repeater channels. *See* Sections 95.1-95.181 of the Commission's Rules, 47 C.F.R. §§ 95.1-95.181. As of July 31, 1994, the Commission had licensed 11,981 GMRS systems.
[4] Petition at 3-4.
[5] *Id.* at 7-8.
[6] Comment of REACT International, Inc. at 1.
[7] Petition at 2.
[8] Petition at 7.
[9] Section 95.29(f) of the Commission's Rules, 47 C.F.R. § 95.29(f) authorizes family members using GMRS mobile and small base stations to transmit in the simplex mode with no more than 5 watts ERP on the channels at 462.5625, 462.5875, 462.6125, 462.6375, 462.6625, 462.6875, and 462.7125 MHz.
[10] These channels would be at 467.5625, 467.5875, 467.6125, 467.6375, 467.6625, 467.6875, and 467.7125 MHz.
[11] Petition at 6-7.
[12] Comments of PRSG at 17, REACT International at 5-10.
[13] Comments of PRSG at 3-4.
[14] Comments of Michael C. Trahos at 5-6.
[15] Comments of TIA at 1, Motorola at 3.
[16] Comments of TIA at 2, Motorola at 6.

Tandy's proposal is the proper compromise between a low cost sophisticated two-way radio service that provides greater service reliability than the Citizens Band (CB) Radio Service[17] and a complex service that would require more regulatory oversight.[18] TIA says that consumer acceptable radios will have to provide selective calling.[19] Motorola states that the bandwidth of the transmissions should be limited to 12.5 kHz.[20]

7. The petition and the comments make a convincing argument as to the need for a good quality very short range unlicensed voice radio communications service for use by small groups.[21] We believe that this service would provide most small groups, such as families, friends, and associates, with good quality voice communications over a range of a few city blocks. It would facilitate activities around the home, at group outings, and at group activities where members become separated, either planned or inadvertently. It would also be useful to hunters, campers, hikers, bicyclists, and other outdoor activity enthusiasts. It appears that technology can make such a service very convenient to use and widely affordable.[22] Further, it would create new jobs as well as provide more choices for consumers. We propose, therefore, to amend the rules to establish a Family Radio Service.

8. Each channel would be usable simultaneously by many millions of small groups throughout the country. The technical standards proposed by Tandy should provide good quality communications over a range of approximately one kilometer. A number of factors, however, limit the interference potential of these units. First, there is the line-of-sight propagation characteristic of frequencies in the UHF domain. Next, simple antennas that are an integral part of the unit together with its very low transmitter power will further restrict its range. Another feature is the capture effect provided by FM emission types.[23] We agree that selective calling[24] would help enable this service to co-exist with the GMRS as well as make it possible for user groups to enjoy a modicum of privacy.

9. Tandy, Motorola, and TIA state that for FRS to be attractive to users, there should be no requirements for operator or station licenses. We agree. We can not foresee any regulatory purpose that would be served by requiring operator or station licenses in such a radio service. We propose, therefore, to establish the Family Radio Service within the Citizens Band (CB) Radio Service and authorize operation by rule under Section 307(e) of the Communications Act.[25] We propose to regulate the usage of the FRS units through technical standards and type certification.[26] We propose to rely upon only four simple operating rules,[27] and to amend the rules necessary to authorize FRS as one of the personal radio services. We solicit comment on these proposals.

10. We are not persuaded by the claim that unlicensed FRS units are incompatible with the GMRS. We believe that these two services can share certain channels successfully. The technical standards for the FRS units should preclude any serious disruption to GMRS systems. None of the channels proposed for the FRS is authorized for the wide area repeater stations in GMRS systems, where interference is most likely to occur.[28] Moreover, the seven shared channels we propose for FRS are currently available to GMRS systems for communications similar to that proposed for the FRS.[29] We solicit comment on our conclusion with regard to interference.

11. We also propose technical standards similar to those requested in the petition and the comments. The units would transmit frequency modulated voice emission type F3E only. The authorized bandwidth would be 12.5 kHz. The maximum power of the transmitter would be one-half watt. The antenna must be an integral part of the transmitter, have no gain, and be vertically polarized. We specifically request comments regarding the sufficiency of the

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[17] The CB Radio Service is a personal radio service authorized in the High Frequency portion of the radio spectrum. The propagation characteristics of these frequencies often result in severe interference between stations, and communications over distances that are much greater than the users desire.

[18] Comments of Motorola at 3. The CB service is an unlicensed, High Frequency (HF), short-distance voice communications service for personal or business activities. Although channel reusability is often limited by HF propagation characteristics and over-powered stations, it continues to have great acceptance by the public. CB has introduced millions of people to the benefits of two-way radio.

[19] Comments of TIA at 1-2.

[20] Comments of Motorola at 6.

[21] In 1983, we proposed to create a new private radio communications service (PRCS) that would have served many of the same needs as FRS. We did not allocate the proposed 8 MHz of spectrum for PRCS at that time, concluding that the spectrum was reserved for future growth of land mobile and cellular radio systems. *See Report and Order*, Gen Docket No. 83-26, para. 21, 50 Fed. Reg. 865 (1985). We also did not adopt our proposal to create the Consumer Radio Service because the comments in that proceeding did not show there was a need for the service, and no manufacturers came forward that were willing to produce equipment. *See Report and Order*, PR Docket No. 86-38, para. 11, 2 FCC Rcd 2383, (1987).

[22] The only costs to the user would be the cost of the FRS units is estimated to be $100-$150 each and the cost of replacement batteries.

[23] Capture effect is the phenomenon whereby the strongest signal received on a frequency is the only signal that is demodulated by a FM receiver tuned to that frequency.

[24] Selective calling is a feature that permits the user of a unit to program it so that only a unique sequence of tones will activate the receiver. Transmissions of other units on the same channel would not activate the programmed receiver.

[25] Section 307(e) of the Communications Act of 1934, as amended, 47 U.S.C. 307(e), provides that, the term "citizens band radio service" shall have the meaning given it by the Commission by rule, and that the Commission may by rule authorize the operation of such radio stations without an individual license.

[26] The requirements for type certification can be found in Sections 2.1031-2.1045 of the Commission's Rules, 47 C.F.R. §§ 2.1031-2.1045.

[27] The proposed rules cover eligibility and responsibility, authorized locations, types of communications, and equipment requirements.

[28] A repeater is a station that receives the signal of another station on one frequency and retransmits that signal on a different frequency. One of the primary uses of a repeater is to increase the area over which a low power hand held station can communicate. This use is inconsistent with the type of communications FRS is designed to satisfy.

[29] 47 C.F.R. § 95.29(f). A licensee does not require any permission from the FCC to use these channels after a GMRS system license has been granted.

proposed technical standards to support this new radio service. Comments should indicate whether any of the proposed technical standards need to be relaxed or tightened, and whether other standards should be included in the rules.

12. A related issue is interconnection with the public switched network (PSN).[30] We propose not to allow interconnection between FRS stations and the PSN. We want to ensure that the unique niche envisioned for this proposed low power Family Radio Service not be compromised. However, we request comments regarding whether interconnection with the PSN should be permitted and if so, any restrictions or conditions that should be imposed.

13. With respect to the comment of TIA regarding the need for selective calling, we are not proposing rules that would require suppliers to incorporate such a capability in their units. We agree, however, that selective calling would enhance the appeal of the FRS by allowing users to answer calls addressed to them without having to also monitor all other communications on the channel. The proposed rules, therefore, would allow a supplier the option to provide such a capability if it desires. Commenters advocating rules mandating a Commission-specified interoperable selective calling standard should provide proposed technical standards suitable for inclusion in the rules.

III. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

14. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

15. An initial Regulatory Flexibility Analysis is contained in Appendix A.

16. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Analysis in Appendix A, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612 (1981).

Comment Dates

17. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **October 2, 1995**, and reply comments on or before **October 16, 1995**. To file formally in this proceeding, you must file an original and five copies of all comments and reply comments. To file informally, you must file an original and one copy of your comments, provided only that the Docket Number is specified in the heading. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

Ordering Clause

18. Authority for issuance of this *Notice* is contained in Sections 4(i), 303(b), 303(r), and 307(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(b), 303(r), and 307(e).

19. For further information, contact William T. Cross, Private Wireless Division, Wireless Telecommunications Bureau, (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Reason for Action

The Commission is proposing to amend Part 95 of its rules to establish a new Family Radio Service within the CB Radio Service. This change will provide a new and innovative communication service and promote more efficient use of the radio spectrum.

Objectives

The proposed rules will encourage rapid deployment and growth of inexpensive low power communications equipment for use by groups in which members need to communicate over short distances.

Legal Basis

The proposed action is authorized under Sections 4(i), 303(b), 303(r), and 307(e) of the Communications Act, 47 U.S.C. §§ 154(i), 303(b), 303(r), and 307(e).

Report, Recordkeeping and Other Compliance Requirements

None.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None.

[30] For purposes of this proceeding, we consider interconnection to be any arrangement that allows messages transmitted by FRS stations to be connected to the public switched network.

Description, Potential Impact, and Small Entities Involved

The proposed rule change would benefit individuals by allowing them to make use of new services, and producers of personal communications equipment. Most users are expected to be members of groups such as families that desire to communicate by radio over very short distances.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

None.

APPENDIX B

Part 95 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 95-Personal Radio Services

1. The authority citation for Part 95 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303.

2. Subpart B, Sections 95.191 through 95.194, is added to Part 95 to read as follows:

Subpart B - Family Radio Service (FRS)

GENERAL PROVISIONS

Sec.

95.191 (FRS Rule 1) Eligibility and responsibility.
95.192 (FRS Rule 2) Authorized locations.
95.193 (FRS Rule 3) Types of communications.
95.194 (FRS Rule 4) FRS units.

Subpart B-Family Radio Service (FRS)

GENERAL PROVISIONS

§ 95.191 (FRS Rule 1) Eligibility and responsibility.

(a) Unless you are a representative of a foreign government, you are authorized by this rule to operate an FCC certified FRS unit in accordance with the rules in this subpart. No license will be issued.

(b) You are responsible for all communications that you make with the FRS unit. You must share each channel with other users. No channel is available for the private or exclusive use of any entity.

§ 95.192 (FRS Rule 2) Authorized locations.

(a) Provided that you comply with these rules, you are authorized to operate an FRS unit:

(1) Within or over any area of the world where radio services are regulated by the FCC; (this area includes the fifty United States and the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands (50 islets and cays), American Samoa (seven islands), the Commonwealth of Northern Marianna Islands, and Guam Island) or

(2) Within or over any other area of the world, except within or over the territorial limits of areas where radio services are regulated by an agency of the United States other than the FCC or any foreign government (you are subject to its rules); or

(3) Aboard any vessel or aircraft registered in the United States, with the permission of the captain, that is within or over any area of the world where radio services are regulated by the FCC or upon or over international waters; or

(4) Aboard any unregistered vessel or aircraft owned or operated by a United States citizen or company that is within or over any area of the world where radio services are regulated by the FCC or upon or over international waters.

(5) You must operate the FRS unit only according to any applicable treaty to which the United States is a party. The FCC will make public notice of any such conditions.

(b) Your use of an FRS unit must not cause harmful interference to a FCC monitoring facility. Doing so could result in imposition of restrictions upon the operation of the FRS unit within 0.8 km (0.5 mile) of the facility by its Engineer-in-Charge. (Geographical coordinates of the facilities that require protection are listed in § 0.121(c) of this chapter.)

(c) The FCC may impose additional restrictions on a FRS station if the station is located at a point within the *National Radio Quiet Zone* (an area within the States of Maryland, Virginia and West Virginia). The Zone is the area bounded by:

(1) $39^{0}15'$N. on the North;

(2) $78^{0}30'$W. on the East;

(3) $37^{0}30'$N. on the South; and

(4) $80^{0}30'$W. on the West.

§ 95.193 (FRS Rule 3) Types of communications.

(a) You may use an FRS unit to conduct two-way voice communications with another person. You may use the FRS unit to transmit one-way communications only to establish communications with another person, send an emergency message, provide traveler assistance, make a voice page, or to conduct a brief test.

(b) The FRS unit may transmit tones to make contact or to continue communications with a particular FRS unit. If the tone is audible (more than 300 Hertz), it must last no longer than 15 seconds at one time. If the tone is subaudible (300 Hertz or less), it may be transmitted continuously only while you are talking.

(c) You must not use an FRS unit in connection with any activity which is against federal, state or local law.

(d) You must, at all times and on all channels, give priority to emergency communication messages concerning the immediate safety of life or the immediate protection of property.

(e) No FRS unit may be interconnected to the public switched telephone network.

§ 95.194 (FRS Rule 4) FRS units.

(a) You may only use an FCC certified FRS unit. (You can identify an FCC certified FRS unit by the label placed on it by the manufacturer.)

(b) You must not make, or have made, any internal modification to an FRS unit. Any internal modification cancels the FCC certification and voids your authority to operate the unit in the FRS.

(c) You may not attach any antenna, power amplifier, or other apparatus to an FRS unit that has not been FCC certified as part of that FRS unit. There are no exceptions to this rule and attaching any such apparatus to a FRS unit cancels the FCC certification and voids everyone's authority to operate the unit in the FRS.

3. Section 95.401 is revised to read as follows:

§ 95.401 (CB Rule 1) What are the Citizens Band Radio Services?

The Citizens Band Radio Services are:

(a) The Citizens Band (CB) Radio Service-a private, two-way, short-distance voice communications service for personal or business activities of the general public. The CB Radio Service may also be used for voice paging.

(b) The Family Radio Service (FRS)-a private, two-way, very short-distance voice communications service for facilitating family and group activities. The rules for this service are contained in Subpart B of this part.

4. Section 95.601 is revised to read as follows:

§ 95.601 Basis and purpose.

These rules provide the technical standards to which each *transmitter* (apparatus that converts electrical energy received from a source into RF (radio frequency) energy capable of being radiated) used or intended to be used in a station authorized in any of the Personal Radio Services must comply. They also provide requirements for obtaining type acceptance of such transmitters. The Personal Radio Services are the GMRS (General Mobile Radio Service), the Family Radio Service (FRS), the R/C (Radio Control Radio Service), and the CB (Citizens Band Radio Service). For operating rules, see Part 95, subpart A-GMRS; subpart B-FRS; subpart C-R/C; and subpart D-CB.

5. Section 95.603 is amended by revising the heading and adding paragraph (d) to read as follows:

§ 95.603 Type acceptance or certification required.

* * * * *

(d) Each *FRS unit* (a transmitter that operates or is intended to operate in the FRS) must be certified for use in the FRS in accordance with Subpart J of Part 2 of this chapter.

6. Section 95.605 is revised to read as follows:

§ 95.605 Type acceptance and certification procedures.

Any entity may request type acceptance or certification for its transmitter in one of the Personal Radio Services, following the procedures in Part 2 of this chapter.

7. Sections 95.627 through 95.669 are redesignated as 95.629 through 95.671 and a new Section 95.627 is added to read as follows:

§ 95.627 FRS unit channel frequencies.

(a) The FRS unit channel frequencies are:

Channel No.	(MHz)
1	462.5625
2	462.5875
3	462.6125
4	462.6375
5	462.6625
6	462.6875
7	462.7125
8	467.5625
9	467.5875
10	467.6125
11	467.6375
12	467.6625
13	467.6875
14	467.7125

(b) Each FRS unit must be maintained within a frequency tolerance of 0.0005%.

8. Section 95.629 is amended by revising paragraph (b), redesignating paragraphs (d) and (e) as paragraphs (e) and (f) respectively, and adding a new paragraph (d) to read as follows:

§ 95.629 Emission types.

*****

(b) An R/C transmitter may transmit any appropriate non-voice emission which meets the emission limitations of § 95.633.

*****

(d) An FRS unit may transmit only emission type F3E. A non-voice emission is limited to selective calling or tone-operated squelch tones to establish or continue voice communications.

*****

9. Section 95.631 is amended by adding a new paragraph (c) to read as follows:

§ 95.631 Emission bandwidth.

*****

(c) The authorized bandwidth for emission type F3E transmitted by a FRS unit is 12.5 kHz.

10. Section 95.633 is amended by revising paragraph (b) to read as follows:

§ 95.633 Unwanted radiation.

*****

(b) The power of each unwanted emission shall be less than TP as specified in the applicable paragraph:

Transmitter	Emission type	Applicable paragraphs
GMRS	A1D, A3E, F1D, G1D, F3E, G3E with filtering.....	(1), (3), (7)
	A1D, A3E, F1D, G1D, F3E, G3E without filtering....	(5), (6), (7)
	H1D, J1D, R1D, H3E, J3E, R3E.....	(2), (4), (7)
FRS.....	F3E with filtering.....	(1), (3), (7)

NOTE: Filtering refers to the requirement in § 95.635(b)

R/C:

27 MHz band As specified in § 95.629(b).....(1), (3), (7)

72-76 MHz band As specified in § 95.629(b)..... (1), (3), (7), (10), (11), (12)

CB..... A1D, A3E..... (1), (3), (8), (9) H1D, J1D, R1D, H3E, J3E, R3E..... (2), (4), (8), (9) A1D, A3E type accepted ..... (1), (3), (7) before September 10, 1976 H1D, J1D, R1D, H3E, J3E, R3E type ..... (2), (4), (7) accepted before September 10, 1986

*****

11. Section 95.635 is amended by revising paragraph (a) to read as follows:

§ 95.635 Modulation standards.

(a) A GMRS transmitter that transmits emission types F1D, G1D, or G3E must not exceed a peak frequency deviation of plus or minus 5 kHz. An FRS unit or a GMRS transmitter that transmits emission type F3E must not exceed a peak frequency deviation of plus or minus 5 kHz.

*****

12. Section 95.637 is amended by adding a new paragraph (d) to read as follows:

§ 95.637 Maximum transmitter power.

*****

(d) No FRS unit, under any condition of modulation, shall exceed 0.500 W Carrier power (average TP during one unmodulated RF cycle) when transmitting emission type F3E.

13. Section 95.645 is revised to read as follows:

§ 95.645 FRS unit and R/C transmitter antennas.

The antenna of each FRS unit, and the antenna of each R/C station transmitting in the 72-76 MHz band, must be an integral part of the transmitter. The antenna must have no gain (as compared to a half-wave dipole) and must be vertically polarized.

14. Section 95.647 is revised to read as follows:

§ 95.647 Power capability.

No CB or R/C station transmitter or FRS unit shall incorporate provisions for increasing its transmitter power to any level in excess of the limit specified in § 95.637.

15. Section 95.649 is revised to read as follows:

§ 95.649 Crystal control required.

All transmitters used in the Personal Radio Services must be crystal controlled, except an R/C station that transmits in the 26-27 MHz frequency band, and a FRS unit.

16. Appendix 1 to Subpart E is amended by adding the definition for "FRS", in alphabetical order, to read as follows:

APPENDIX 1 TO SUBPART E-GLOSSARY OF TERMS

*****

FRS. Family Radio Service.

*****

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Toledo Broadcasting Company, Inc. — File Nos. BR-890530WF, BRH-890530VF
for renewal of license of Stations
WSPD(AM)/WLQR(FM), Toledo, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1995: **Released: August 2, 1995**

By the Commission:

1. The Commission has before it: (1) our decision in *Toledo Broadcasting Inc.*, 7 FCC Rcd 669 (1992) (*"Toledo Broadcasting"*); (2) a Petition for Reconsideration of that decision filed by the Ohio State Conference of Branches of the NAACP (hereinafter "NAACP"); (3) the licensee's opposition to the petition for reconsideration; and (4) the NAACP's reply to the opposition. For the reasons that follow, we dismiss the NAACP's petition.

2. In *Toledo Broadcasting*, we concluded, *inter alia*, that the NAACP had not demonstrated that it was a "party in interest" pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), with respect to the stations' renewal applications because the declarations filed with the petition to deny failed to establish the NAACP's standing. Specifically, the NAACP failed to provide a declaration from anyone who claimed to be a listener or service area resident of the Toledo stations named in the petition to deny. After considering the NAACP's pleading as an informal objection, we granted the stations' applications, subject to reporting conditions. In seeking reconsideration, the NAACP does not dispute the facts underlying our decision to treat its petition to deny as an informal objection. Rather, the NAACP argues that because we recognized the existence of the Toledo Branch of the NAACP,[1] we should have presumed "that NAACP has local residents affected by the stations' operations, either as listeners or as participants in the job market."

3. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, states than any party to an order, decision, report or action by the Commission or any other person aggrieved or whose interests are adversely affected, may petition for reconsideration. *See also, Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984); 47 C.F.R. § 1.106. To qualify as a party, a petitioner for reconsideration must have filed a valid petition to deny against the application whose grant the petitioner now seeks to have reconsidered. *Community Access; Gulfcoast Broadcasting, Inc. (WMMK-FM)*, 8 FCC Rcd 483 (1993); *Montgomery County Broadcasting Corp.*, 65 FCC 2d 876 (1977). If the petition for reconsideration is filed by one who is not a "party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1); *see Community Access*.

4. The NAACP's petition to deny against the license renewal applications for Stations WSPD/WLQR-FM was not supported by a declaration as required by 47 U.S.C. § 309(d)(1). *See also*, 47 C.F.R. § 73.3584. The Commission is not obligated to presume, as the NAACP would have us do here, facts that a petitioner is required to allege. Accordingly, under the circumstances, we properly dismissed the NAACP's petition. *See Gulfcoast Broadcasting, Inc. (WMMK-FM); Broadcast Stations Serving the State of Florida*, 3 FCC Rcd 1930 (1988). As an informal objector, the NAACP lacks standing to bring the instant petition because it is not a "party to the proceeding" within the meaning of Section 405 of the Communications Act and Section 1.106 of the Commission's Rules. Moreover, the NAACP's petition for reconsideration has not demonstrated that its interests were adversely affected by our decision in *Toledo Broadcasting*, nor has it demonstrated that it was not possible for it to participate as a petitioner to deny in the earlier stages of the proceeding. Hence, we find that the NAACP has not complied with the procedural requirements of Section 1.106. *See Montgomery;* 47 C.F.R. § 1.106. Therefore, we dismiss the NAACP's petition for reconsideration.

5. Accordingly, IT IS ORDERED, that the petition for reconsideration filed February 25, 1992 by the NAACP, IS DISMISSED.[2]

6. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail – Return Receipt Requested, copies of this Memorandum Opinion and Order to the NAACP and Toledo Broadcasting Company, Inc.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] In discussing sources contacted by the licensee in its minority recruitment efforts, we noted that the licensee listed the Toledo Branch as one of them.

[2] The NAACP also incorporated by reference a petition by Booth American Company to deny a then-pending application to assign the licenses of WSPD(AM)/WLQR(FM) from Toledo Broadcasting Company Inc. to Stratford Research, Inc. However, the Commission subsequently denied Booth's petition. *In re Application of Toledo Broadcasting Inc.*, Chief, Audio Services Division (released October 6, 1992). Accordingly, this aspect of the NAACP's petition is moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

North County Broadcasting Corporation, Debtor-in-Possession, for renewal of license of Stations KSPA(AM)/KOWF(FM), Escondido, California

File Nos. BR-900730YH
BRH-900730B2

MEMORANDUM OPINION AND ORDER

Adopted: July, 19, 1995; Released: August 2, 1995

By the Commission:

1. The Commission has before it: (1) our decision in *North County Broadcasting Corporation*, 9 FCC Rcd 871 (1994) ("*North County*"); (2) a Petition for Reconsideration of that decision filed by the California State Conference of Branches of the NAACP (hereinafter "NAACP"); (3) a motion by the licensee for extension of time; and (4) the licensee's opposition to the petition for reconsideration. For the reasons that follow, we dismiss the NAACP's petition.

2. In *North County*, we concluded, *inter alia*, that the NAACP had not demonstrated that it was a "party in interest" pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), with respect to the stations' renewal applications because the declarations filed with the petition to deny failed to establish the NAACP's standing. Specifically, the NAACP failed to provide a declaration from anyone who claimed to be a listener or service area resident of the Escondido stations named in the petition to deny. After considering the NAACP's pleading as an informal objection, we granted the stations' applications, subject to reporting conditions. In seeking reconsideration, the NAACP does not dispute the facts, or in any other way contest our original decision to treat its petition to deny as an informal objection.

3. Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, states than any party to an order, decision, report or action by the Commission or any other person aggrieved or whose interests are adversely affected, may petition for reconsideration. *See also Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984); 47 C.F.R. § 1.106. To qualify as a party, a petitioner for reconsideration must have filed a valid petition to deny against the application whose grant the petitioner now seeks to have reconsidered. *Gulfcoast Broadcasting, Inc. (WMMK-FM)*, 8 FCC Rcd 483 (1993); *Montgomery County Broadcasting Corp.*, 65 FCC 2d 876 (1977). If the petition for reconsideration is filed by one who is not a "party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1); *see Community Access*, 737 F.2d at 84.

4. The NAACP's petition to deny against the license renewal applications for Stations KSPA(AM)/KOWF(FM) was not supported by a declaration as required by 47 U.S.C. § 309(d)(1). *See also* 47 C.F.R. § 73.3584. Under the circumstances, we properly dismissed the NAACP's petition. *See Gulfcoast Broadcasting, Inc. (WMMK-FM)*, 8 FCC Rcd at 483; *Broadcast Stations Serving the State of Florida*, 3 FCC Rcd 1930 (1988). As an informal objector, the NAACP lacks standing to bring the instant petition because it is not a "party to the proceeding" within the meaning of Section 405 of the Communications Act and Section 1.106 of the Commission's Rules. Moreover, the NAACP's petition for reconsideration has not demonstrated that its interests were adversely affected by our decision in *North County*, nor has it demonstrated that it was not possible for it to participate as a petitioner to deny in the earlier stages of the proceeding. Hence, we find that the NAACP has not complied with the procedural requirements of Section 1.106. *See Montgomery*, 65 FCC 2d at 877; 47 C.F.R. § 1.106. Therefore, we dismiss the NAACP's petition for reconsideration.

5. Accordingly, IT IS ORDERED, that the petition for reconsideration filed March 3, 1994, by the NAACP, IS DISMISSED.

6. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested, copies of this Memorandum Opinion and Order to the NAACP and North County Broadcasting Corporation, Debtor-in-Possession.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-44

In the Matter of

Amendment of Section 73.202(b), RM-8602
Table of Allotments,
FM Broadcast Stations.
(Fair Bluff, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1995; Released: August 2, 1995

By the Chief, Policy & Rules Division:

1. At the request of Atlantic Broadcasting Co., Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 4018 (1995), alternatively proposing the deletion of vacant and unapplied-for Channel 287A at Fair Bluff, North Carolina, or the retention of the channel with a 12.7 kilometer (7.9 mile) northeast site restriction. Comments were filed by the petitioner, reiterating its desire to have Channel 287A deleted from Fair Bluff, and by S.O.S. Broadcasting ("SOS"), Jack Miller ("Miller") and Robert Gauss ("Gauss"), each expressing an intention to apply for Channel 287A at Fair Bluff. Reply comments were filed by the petitioner.

2. Petitioner, licensee of Station WDAR-FM, Channel 288C3, Darlington, South Carolina, currently operates with a directional antenna to protect the Fair Bluff allotment. It requested the deletion or site restriction of Channel 287A at Fair Bluff to accommodate Station WDAR-FM's pending application specifying non-directional operation (BMPH-950224ID). Miller, in stating his intention to apply for the channel, stated that he had no objection to the imposition of the proposed site restriction while Gauss was silent on the issue. SOS, however, objects to the site restriction, stating that the site restriction could "seriously" impair the viability of the station because of the "limited" principal community contour coverage capability of Class A stations. In addition, it believes the site restriction may make it extremely difficult, if not impossible, to locate an acceptable transmitter site given current local regulatory difficulties in establishing transmitter sites. SOS submits that the Commission prefers the establishment of new broadcast service over the enhancement of existing services, citing *Andalusia, Alabama*, 49 FR 32201 (1984). Because the petitioner has not shown that the imposition of the site restriction is the only way in which the station can achieve omnidirectional operation or that Station WDAR-FM's current coverage is inadequate, it urges the retention of Channel 287A at Fair Bluff without the proposed site restriction.

3. In response, petitioner states that the public interest would be served by imposing the proposed site restriction on Channel 287A at Fair Bluff because Station WDAR-FM will be able to provide service to an additional 3,800 people, while also permitting Fair Bluff to retain the FM channel. Petitioner states that SOS is the only party to object to the imposition of the site restriction, pointing out that neither Miller nor Gauss objected to the imposition of the proposed site restriction, with Miller affirmatively stating that it had no objection. It states that the reasons for SOS's objections, that the site restriction could make it difficult to provide Fair Bluff with the required city-grade signal and that general regulatory difficulties may make it difficult to locate an acceptable transmitter site, are wrong. Petitioner states that it has not only located a proposed transmitter site (at coordinates 34-21-08 North Latitude; 78-54-07 West Longitude) only 0.86 kilometers from the suggested reference coordinates from which a station could provide Fair Bluff with the required 70 dBu city-grade signal but also obtained permission to construct a transmitter. In addition, petitioner submits that it has contacted officials with the Columbus County building permit office who stated that they did not see any reason why a building permit would not be issued for the proposed facility and foresaw no local zoning problems. Finally, petitioner states that its technical consultant believes a proposed 105 meter tower would have no detrimental aeronautical effect since the site is approximately 20 kilometers from the nearest airport and thus FAA approval would be given.

DISCUSSION

4. We believe the public interest would be served by retaining Channel 287A at Fair Bluff since interests have been expressed in activating the channel. We also believe that the public interest would be served by site restricting the Fair Bluff allotment as proposed in the *Notice* so as to enable Station WDAR-FM to expand its service area by operating omnidirectionally. While SOS has raised objections to the proposed site restriction, we find that its objections are only speculative. SOS states that the proposed site restriction could "seriously" harm the viability of the prospective station because of the limited city-grade contour of a Class A station. However, it provides no technical showing that a station operating within the site restricted area could not provide the required signal level to all of Fair Bluff. The Commission assumes, at the allotment stage, that a Class A station can provide principal city coverage to its community of license if the transmitter is situated no more than 16.2 kilometers (10.1 miles) from the center of the community. Here, the site restriction being imposed on Channel 287A is 12.7 kilometers (7.9 miles). SOS also opposed the imposition of the site restriction based on the possibility that local regulatory policies could make it difficult to locate an acceptable transmitter site within the permissible site restricted area. However, SOS again has failed to provide any evidence that such problems exist or are even likely. To the contrary, petitioner, based on conversations with local officials, states that the officials see no reason why permission to construct a transmitter should pose any zoning or other local problems.

TECHNICAL SUMMARY

5. Channel 287A can be retained at Fair Bluff with a site restriction of 12.7 kilometers (7.9 miles) northeast to ac-

commodate petitioner's pending application.[1] Use of these coordinates shows a short-spacing to Station WYNA, Channel 285A, Tabor City, North Carolina. However, Station WYNA has been modified to specify operation on Channel 285C3 and its community of license has been changed to Calabash, North Carolina, pursuant to MM Docket No. 93-249 (9 FCC Rcd 7857 (1994)). While Station WYNA has filed an application (ARN-959512IB) specifying a transmitter site which complies with the spacing requirements to Channel 287A at Fair Bluff at the coordinates specified herein, final licensing of a Fair Bluff Channel 287A station may be withheld pending the licensing of Station WYNA at Calabash.

6. Accordingly, IT IS ORDERED, That the petition of Atlantic Broadcasting Company, Inc. (RM-8602) IS GRANTED IN PART AND DENIED IN PART.

7. The window period for filing applications for Channel 287A at Fair Bluff, North Carolina, will open on **September 18, 1995**, and close on **October 19, 1995**.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 287A at Fair Bluff are 34-21-22 North Latitude and 78-54-36 West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-121

In the Matter of

Amendment of Section 73.202(b), RM-8220
Table of Allotments,
FM Broadcast Stations.
(Buena Vista, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 27, 1995; Released: August 2, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 3532 (1993), issued in response to a petition filed on behalf of Riley M. Murphy ("petitioner"), permittee of Station KBVC(FM), Channel 281A, Buena Vista, Colorado, proposing the substitution of Channel 281C3 for Channel 281A and modification of her authorization accordingly.[1] Petitioner filed supporting comments. No other comments were received.

2. Based upon the petitioner's continuing expression of interest, we will substitute Channel 281C3 for Channel 281A at Buena Vista, Colorado, since it could provide an enhanced FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the authorization issued to Riley M. Murphy for Station KBVC(FM) (File No. BPH-891214MW) to specify operation on Channel 281C3 in lieu of Channel 281A at Buena Vista, Colorado, as requested.[2]

3. As stated in the *Notice*, Channel 281C3 can be allotted to Buena Vista, at the petitioner's specified site, located 21.0 kilometers (13.1 miles) south of the community at coordinates 38-39-49 and 106-12-50, in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 18, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Buena Vista, Colorado, as follows:

City	Channel No.
Buena Vista, Colorado	281C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the authorization issued to Riley M. Murphy (File No. BPH-891214MW) for Station KBVC(FM), IS MODIFIED to specify operation on Channel 281C3 in lieu of Channel 281A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Riley M. Murphy, permittee of Station KBVC(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Buena Vista, Colorado.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Following adoption of the *Notice* herein, the construction permit issued to Riley M. Murphy for Station KBVC(FM) (File No. BPH-891214MW) was cancelled and the call sign deleted. Pursuant to the grant of a petition for reconsideration on July 14, 1995, the call sign (KBVC(FM)) was reinstated and the permittee was granted a six month extension of time in which to construct the facilities for Station KBVC(FM).

[2] Following the filing of the instant rule making proposal, the Commission amended its Rules to permit, *inter alia*, modification of FM authorizations through a "one step" application process. *See, FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993). Although not required to do so, a petitioner having submitted a proposal that upon the effective date of the new rules could be entertained through the application process, is permitted to withdraw its petition for rule making and submit its proposal in the form of an application. In this instance, petitioner has not requested a withdrawal of the *Notice of Proposed Rule Making*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-127

In the Matter of

Amendment of Section 73.202(b), RM-8676
Table of Allotments,
FM Broadcast Stations.
(Oro Valley, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 27, 1995; Released: August 2, 1995

Comment Date: September 25, 1995
Reply Comment Date: October 10, 1995

By the Chief, Policy & Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Rita Bonilla ("petitioner") seeking the allotment of Channel 277A to Oro Valley, Arizona, as that community's second local FM service. Petitioner stated her intention to apply for Channel 277A if it is allotted to Oro Valley.

2. A staff review of the proposal reveals that Channel 277A can be allotted to Oro Valley, Arizona, in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules, provided the transmitter therefor is sited at least 9.9 kilometers (6.1 miles) northwest of the community at coordinates 32-26-45 and 111-02-54.[1] Additionally, as Oro Valley is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain the concurrence of the Mexican government in the proposal.

3. In view of the petitioner's stated interest in providing a second local FM service to Oro Valley, we will propose to allot Channel 277A to that community, as requested. Therefore, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Oro Valley, Arizona, as follows:

	Channel No.	
City	Present	Proposed
Oro Valley, Arizona	248A	248A, 277A

4. IT IS ORDERED, That the Secretary of the Commission shall send a copy of this *Order* to the following:

Ron Ancell, Trustee
Radio Station KLQB(FM)
1721 West Klamath Drive
Tucson, AZ 85704

Desert West Air Ranchers
Corporation
P.O. Box 36717
Tucson, AZ 85740
(Assignee)

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **September 25, 1995**, and reply comments on or before **October 10, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Robert Lewis Thompson, Esq.
Taylor, Thiemann & Aitken
908 King Street
Suite 300
Alexandria, VA 22314

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been

[1] The proposal to allot Channel 277A to Oro Valley is short spaced to Station KLQB(FM), Channel 276A, Oracle, Arizona, at coordinates 32-37-07 and 110-47-20, and thus is dependent upon Station KLQB(FM) moving to Channel 279A in accordance with the modification provisions set forth in the *Report and Order* in MM Docket No. 93-69. *See* 10 FCC Rcd (1995), adopted June 29, 1995. Therefore, as the Oro Valley allotment proposal is dependent upon the grant of a license to Station KLQB(FM) on Channel 279A, the issuance of a license for Channel 277A at Oro Valley may be withheld until the license grant occurs at Oracle. The trustee for the licensee of Station KLQB(FM), as well as the assignee thereof, will be provided with a copy of this *Order*.

served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 26, 1995

Released: August 3, 1995

IN REPLY REFER TO:
1800C1-RHW
92020172

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Patrick Markham, President
Brooke Communications, Inc.
Licensee of Station KRSB-FM, Roseburg, Oregon
P.O. Box 5180
Roseburg, Oregon 97470

Dear Mr. Markham:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE against Brooke Communications, Inc. ("Brooke"), pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Communications Act"), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules. As set forth herein, it appears that Brooke participated in an unauthorized transfer of control of Station KKMX(FM), Tri City, Oregon, from FM Broadcasters of Douglas County ("FBDC")[1] to Brooke, without prior Commission consent, inviolation of Section 310 of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules.

This apparent unauthorized transfer of control of Station KKMX was brought to the Commission's attention in connection with an assignment of license proceeding involving the station. An application was filed May 11, 1992, seeking Commission consent to assign the license of KKMX from FBDC to Tri City Communications, Inc. ("TCC") (File No. BALH-920511HT). A Petition to Deny that application was filed by Douglas County Tricasters, Inc. ("Douglas County"), licensee of Station KRNR(AM), Roseburg, Oregon, which alleged, *inter alia:* (1) that FBDC had, starting in January 1991 and continuing through December 1991, engaged in an unauthorized transfer of control of KKMX to Brooke;[2] and (2) that the proposed assignee, TCC, was actually under the control of Brooke, and that such common control would result in a violation of the multiple ownership rules. By Letter dated March 12, 1993, from Larry D. Eads, Chief, Audio Services Division (hereafter "Letter Ruling"), the Petition to Deny was granted in part and denied in part, and the assignment of license application was granted. The Letter Ruling made the tentative finding that an unauthorized transfer of control of KKMX from FBDC to Brooke had taken place during 1991, but was not an impediment to the grant of the assignment application in this case. However, the matter was referred to the Mass Media Bureau's Enforcement Division for further investigation. The grant of the assignment application was made without prejudice to whatever further enforcement action the Commission may deem appropriate regarding the apparent unauthorized transfer of control. In addition, the Letter Ruling found that there was insufficient evidence to indicate that Brooke and TCC were jointly owned or would be operated in a manner that would result in a violation of the multiple ownership rules.

On February 1, 1995, the Commission sent separate letters of inquiry to FBDC and to Brooke seeking further information regarding the operations of KKMX during the 1991 time period. In addition, in view of allegations made by Douglas County regarding control of TCC by Brooke following the consummation of the assignment on April 8, 1993, the Commission included in its letter of inquiry to Brooke certain questions regarding the operation of KKMX after the assignment. The Commission also sent a separate letter of inquiry to TCC on February 1, 1995, to determine whether a second unauthorized transfer of the station from TCC to Brooke had taken place after consummation of the assignment. On March 17, 1995, and March 20, 1995, respectively, Brooke and TCC submitted comprehensive responses to their letters of inquiry. FBDC did not respond to its letter of inquiry. A second letter was sent to FBDC on June 9, 1995, demanding a response to the earlier letter of inquiry, and this second letter -- sent to FBDC at its official mailing address -- was returned to the Commission. However, we believe that we have sufficient information to resolve the issues relating to the alleged unauthorized transfer of control of the station from FBDC to Brooke in 1991, based on the information that was submitted in the assignment of license proceeding and on the information submitted by Brooke in response to the letter of inquiry relating to the 1991 KKMX operations.

Section 310(d) of the Communications Act states, in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commis-

[1] By letter dated February 19, 1992, the Commission was advised that the licensee of Station KKMX, formerly known as Gee Jay Broadcasting, Inc., had changed its business name to "FM Broadcasters of Douglas County." In addition, prior to May 15, 1993, and during the period in which FBDC was licensee, the call sign for Station KKMX was KTRQ-FM. However, for ease of reference, we will henceforth refer to the station by its present call sign, KKMX.

[2] Station KKMX and Brooke's Station KRSB(FM), Roseburg, Oregon, serve substantially the same area. Brooke is 100% owned by the William E. Markham Trust, whose sole beneficiary is William E. Markham. Brooke's President, Treasurer, and sole Director is one of William Markham's sons, Patrick Markham. Patrick Markham is also the majority stockholder, President, Treasurer, and Director of Markham Broadcasting, Inc. ("MBI"), licensee of Station KQEN(AM), Roseburg, Oregon, which is operated in common with and from the same studios as Station KRSB.

sion and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. § 310(d). Section 73.3540(a) of the Commission's Rules states that "[p]rior consent of the FCC must be obtained for a voluntary assignment or transfer of control."

There is no exact formula by which control of a broadcast station can be determined. In ascertaining whether a transfer of control has occurred, we traditionally look beyond the legal title to whether a new entity or individual has obtained the right to determine the basic operating policies of the station. *See WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming, and finances, cannot be delegated. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981). *See also Salem Broadcasting, Inc.*, 6 FCC Rcd 4172 (MMB 1991).

Alleged Unauthorized Transfer of Control from FBDC to Brooke

Based on the response to the Commission's February 1, 1995, letter of inquiry and other relevant documentation submitted in connection with the assignment of license proceeding, it appears that from January 18, 1991, to December 8, 1991, FBDC and Brooke engaged in an unauthorized transfer of control of Station KKMX. The facts leading to this conclusion are as follows.

First, FBDC and Brooke on January 18, 1991, entered into a "Station Service Agreement" whereby Brooke agreed to broker substantially all the time on KKMX. Under that Agreement, Brooke undertook all commercial time sales and programming operations of the station, with the exception of a single, regularly-scheduled public affairs program that was apparently produced by Robert Larson, the President and majority stockholder of FBDC,[3] until approximately September of 1991. In addition, as part of the Station Service Agreement, FBDC sold all the station's studio and transmitting equipment to Brooke for $35,000 in cash, and Brooke then leased back that equipment to FBDC for the nominal amount of $100 per month (which FBDC stopped paying in August 1991). The Station Service Agreement specified that it could be canceled by either party upon one year's notice, but that such cancellation by FBDC would be effective, "at the option of Brooke, upon the repurchase by [FBDC] of the assets . . . at fair market value." The Agreement further specified that Brooke would pay FBDC a monthly fee of $1100 for the right to broker the station. On the same date, Brooke and FBDC entered into an "Option Agreement" for the purchase and sale of the station for $65,000. On June 17, 1991, this option was assigned by Brooke to TCC, which subsequently exercised it to initiate the assignment of license application later filed with the Commission.

With respect to programming, an Agreement with Satellite Music Network for satellite-delivered country music programming was executed on behalf of FBDC on January 23, 1991, by Stanley G. King, who was apparently an officer of FBDC's predecessor. Mr. Larson, the President and majority owner of FBDC, later claimed that this Agreement was arranged by Brooke and was entered into without his knowledge or consent. It is uncontested, however, that this satellite music format was broadcast by the station starting on or about March 3, 1991, and continuing through December 8, 1991, and that Brooke made all payments to Satellite Music Network pursuant to the Agreement. Communications with Satellite Music Network regarding the implementation of the new format were conducted on behalf of the station by Patrick Markham and other employees of Brooke.

With regard to Station KKMX's personnel, as of the date the Station Service Agreement was executed, January 18, 1991, FBDC had four employees, including Robert Larson. All four employees, including Larson himself, were then placed on Brooke's payroll, and Brooke paid their salaries until they were all terminated effective March 2, 1991. Although Mr. Larson was also removed from Brooke's payroll on that date, a further agreement was entered into between Larson and Brooke on April 8, 1991, whereby Larson, in return for the payment from Brooke of $200 per month, agreed to perform certain services to "preserve and enhance the license" for the station, including license renewal matters, program monitoring, preparation of local programming material, review of station logs and FCC filings, review of technical operations, and acting as a liaison between Brooke and FBDC. According to Brooke, Mr. Larson was present at the KKMX studios one to three days per week for varying periods of time from March to September 1991 to review logs and billing and to prepare public affairs programming, an estimate which Mr. Larson disputed (in a statement he supplied to Douglas County in support of its Petition to Deny) as overstating his continued involvement with the station.

At the same time that the station began broadcasting the Satellite Music Network programming, early March 1991, Brooke moved all the KKMX studio equipment from FBDC's main studio in Myrtle Creek, Oregon, closed down the Myrtle Creek main studio, and began operating KKMX from new studios in a building owned by Brooke adjacent to Brooke's KRSB studios. KKMX's main studio was thereafter staffed full-time by Brooke employees from March 3 to December 1991, and part-time by Mr. Larson when he happened to be present there as described above. The station's telephone was answered by a Brooke employee during this period. KKMX's Quarterly Issues/Programs Lists, required by Section 73.3526(a)(9) of the Commission's Rules, were prepared by Brooke's President, Patrick Markham.

Regarding the finances of the station, subsequent to the execution of the Station Service Agreement, and until December 1991, all operating expenses of KKMX (other than the $100 per month equipment lease payment) were paid by Brooke, including all station public utility and tele-

[3] A Form 323 Ownership Report for KKMX dated January 17, 1991, listed Robert Larson as 90% stockholder of FBDC's predecessor, Gee Jay Broadcasting, Inc. A subsequent Form 323 dated October 24, 1992, for FBDC listed Mr. Larson as 100% stockholder.

phone expenses, programming expenses, studio rent (until the KKMX main studio was moved to Brooke's building adjacent to KRSB's studios, for which no rent was paid), station liability insurance, and music licensing fees. By the end of 1991, however, the relationship between FBDC and Brooke deteriorated, and by letter dated December 4, 1991, FBDC advised Brooke that it was preempting all further programming on KKMX. Brooke turned off the station on December 8, 1991. The station remained dark until June 1993, subsequent to the consummation of the assignment of license to TCC.

In addition, Douglas County supplied with its Petition to Deny a written statement dated July 24, 1991, from FBDC's President, Robert Larson, stating that Brooke had taken control of the station from FBDC. This statement made the following assertions:

> The station service agreement stated that I am able to perform my duties, but Brooke Communications has made it difficult if not impossible to approve or disapprove program materials submitted for broadcast and logs are signed off up to seven days after broadcast and not before broadcast. I have not been given the opportunity to provide management personnel to oversee day-to-day operations. I am not allowed to sell broadcast time on [KKMX] and have not produced any commercials for the station from February 1991 to present.
>
> I am Chief Operator of record, but as of this date I have not been allowed to perform this task. I have expressed a dissatisfaction with the programming that has been aired, such as sports, news and music formats and have not been allowed to make decisions to suspend, cancel or delete such programming.

Douglas County subsequently supplied a second statement from Mr. Larson dated July 13, 1992, with its Reply to Opposition to the Petition to Deny. In this second statement, Mr. Larson asserted that although the Satellite Music Network programming Agreement was signed on behalf of FBDC by Stan King, who had been an officer of FBDC's predecessor, that Agreement was executed without Larson's consent, and King had no authority to execute it. In addition, Larson's second statement asserted that Brooke, without Larson's approval, had moved the KKMX main studio from its original location in Myrtle Creek to Brooke's building adjacent to Brooke's KRSB studios. Finally, Larson's statement asserted that he did not go to the KKMX\KRSB studios nearly as often as asserted by Brooke to review programming or other matters, and that the diary entries submitted by Brooke to establish that Larson had made more frequent appearances at the relocated main studio were inaccurate.

Although Mr. Larson supplied his statements to Douglas County to support the contention that control of the station was improperly wrested from him by Brooke against his wishes, we conclude that FBDC and Brooke together participated in a joint effort to transfer control of the station, without prior Commission consent, beginning in January 1991, when FBDC sold all its broadcasting equipment to Brooke and Brooke assumed all primary responsibility for the financial, programming, and personnel-related obligations of the station. It thus appears that FBDC ceded control, and Brooke exercised predominant control, over the operations of Station KKMX from January 18, 1991, to December 8, 1991, in willful violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules. The appropriate sanction for this violation will be discussed below.

Alleged Unauthorized Transfer of Control from TCC to Brooke

As noted at the outset, we have also sought information from Brooke and TCC as to whether Brooke has assumed control of KKMX from TCC subsequent to the consummation of the assignment of the KKMX license from FBDC to TCC. This investigation is separate and apart from the determination set forth in the Letter Ruling that there was insufficient evidence that the familial relationship between Brooke's President, Patrick Markham, and TCC's President and sole stockholder, Patrick's brother Michael Markham, standing alone, would result in common control of TCC, Brooke, and Markham Broadcasting, Inc. (licensee of Station KQEN(AM)). However, in evaluating the record as to whether Brooke has, subsequent to consummation of the assignment on April 8, 1993, assumed control of KKMX from TCC, we must still be mindful that a party alleging a real-party-in-interest or unauthorized transfer issue where a close familial relationship is involved bears a decidedly heavy burden of proof because "even independent family relationships may have attributes, such as financial and business ties, which in a non-family situation would be persuasive indicia of common ownership or control or real party status." *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 655 (Rev. Bd. 1984) (subsequent history omitted). In the present case, however, the record does not support a finding that Brooke and its President, Patrick Markham, have assumed control of Station KKMX from TCC after the consummation of the assignment of the license from FBDC.

First, the record reflects that since TCC became the licensee, Station KKMX has not been operated pursuant to any time brokerage or joint sales arrangement with Brooke. Brooke has not had any significant involvement with providing programming to KKMX. Rather, TCC's programming decisions have been directed by Michael Markham, by KKMX's General Manager, Christine Mackey, and by KKMX's three successive Operations Manager/Program Directors, all of whom have been employed and paid solely by TCC.

Nor has Brooke had any significant involvement in the personnel-related decisions of TCC. While Michael Markham is employed elsewhere as a physician and lives a significant distance from the station, Ms. Mackey has been delegated typical general manager's duties, with overall responsibilities for hiring and terminating all TCC employees, including managers overseeing programming, sales, and operations. In addition to these managers, TCC employs its own advertising sales, traffic, and office staff, all of whom have been hired by Ms. Mackey and are paid solely by TCC. The record indicates that Brooke has not had any involvement in the hiring of any KKMX employees, nor has Brooke paid the salaries of any such KKMX employees. While Ms. Mackey and TCC's initial Operations Manager/Program Director, Ken Sherman, were previously employees of Brooke and were initially recommended to Michael Markham by Patrick Markham, both of them had ended their respective terms of employment many months before being hired by TCC (Ms. Mackey's employment by

Brooke had ended some 17 months before she was hired by TCC), and there is no basis for concluding from such prior employment by Brooke that they still maintained improper ties to Brooke or Patrick Markham after the beginning of their employment by TCC.

In addition, the record indicates that KKMX's finances are completely separate from those of Brooke, and that Brooke has no means of controlling KKMX's finances. KKMX's financial records are maintained by TCC/KKMX employees, and TCC pays all of KKMX's operating expenses from a bank account controlled by Michael Markham and Christine Mackey. Brooke and Patrick Markham have no access to KKMX's bank account, and they do not pay any of the station's expenses. As noted above, all advertising sales are conducted by TCC-paid KKMX employees, and monies collected for such advertising sales are paid directly to TCC.

While Brooke has had no apparent involvement in KKMX's personnel, programming, or finances since TCC became the licensee of the station on April 8, 1993, Brooke has maintained certain ties with the station and with TCC. For example, the station's studio and transmitting equipment are still owed by Brooke, which had, as noted above, purchased that equipment from FBDC in January 1991. The equipment is leased to TCC, but at a price of $1700 per month, as compared to the nominal $100 per month charge made to FBDC under the original Station Service Agreement for essentially the same equipment. TCC rents studio space in a building owned by Brooke adjacent to the KRSB studios (the same building that previously housed the KKMX main studio when Brooke moved it from Myrtle Creek), but the lease reflects arms-length monthly rates ($700 per month, as compared to no rent charged when FBDC was the licensee). TCC also has an agreement with Brooke to share specialized traffic and billing computer software provided from a third party vendor, but the input and billing through this system is conducted by TCC employees alone. Finally in this regard, Brooke provides engineering services to TCC pursuant to another agreement.

We believe that these limited agreements and business relationships between Brooke and TCC do not demonstrate that Brooke, rather than TCC, has exercised control over Station KKMX since TCC became the licensee, especially in view of the recognition, noted above, that there is a higher burden of establishing an unauthorized transfer of control based on business ties where familial relationships are involved. *See Cannon's Point Broadcasting, supra*, 93 FCC 2d 643, 655. Moreover, the record does indicate, as noted above, that TCC has instead maintained firm control over the critical areas of programming, personnel, and finances of Station KKMX. We conclude that Brooke has not improperly assumed control over KKMX, and thus that there has not been any violation of Section 310(d) of the Act, since TCC became the licensee. For these reasons, based on the present record, we do not intend to take any further enforcement action against Brooke or any action against TCC with respect to the alleged unauthorized transfer of control of KKMX subsequent to TCC's acquisition of the station in April 1993, and we consider this aspect of our investigation closed. TCC will be advised of this conclusion through its receipt of a copy of this decision.

CONCLUSION

As set forth above, it appears that Brooke did, without prior Commission consent, assume control over the operations of Station KKMX from January 18, 1991, through December 8, 1991, in willful violation of Section 310(d) of the Communications Act and Section 73.3540 of the Commission's Rules. We do not believe that this violation puts in issue the basic qualifications of Brooke to hold a Commission license; rather, we believe that a monetary forfeiture is the appropriate sanction. To determine the appropriate amount of the forfeiture for this violation, we will directly apply to the specific circumstances of this case the relevant statutory factors in Section 503(b)(2)(D) of the Communications Act, including the nature, circumstances, extent, and gravity of the violations. Our past decisions that predated the *Policy Statement, Standards for Assessing Forfeitures*,[4] and intervening legislative changes,[5] will also be relevant to this determination.

To determine the appropriate monetary forfeiture for Brooke's apparent unauthorized assumption of control of Station KKMX, we have reviewed the precedent and compared the seriousness of this violation with those in other cases. In *Salem Broadcasting, Inc., supra*, 6 FCC Rcd 4172, 4173, the licensee was fined $10,000 for an unauthorized transfer of control and a main studio rule violation that existed for a period of approximately ten months.[6] *Salem*, like the present case, involved a brokerage/programming agreement that, as effectuated, was determined to constitute an unauthorized transfer of control. In *Silver Star Communications-Albany*, 6 FCC Rcd 6905 (1991), the licensee of an AM/FM combination was fined $20,000 for an unauthorized transfer of control of the two stations over a period of 18 months.

In view of the above, pursuant to Section 503(b) of the Communications Act, Brooke Communications, Inc., is hereby advised of its apparent liability for a forfeiture of Ten Thousand Dollars ($10,000.00) for its willful and repeated violation of Section 310(d) of the Communications Act and Section 73.3540 of the Commission's Rules.[7] In regard to this forfeiture, Brooke is afforded a period of thirty (30) days from the date of this Notice "to show, in writing, why a forfeiture penalty should not be imposed or pay the forfeiture. Any showing as to why the forfeiture should not be imposed or reduced shall include a detailed factual statement and such documentation and affidavits as

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[4] 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) ("Policy Statement"). These forfeiture standards were set aside by the United States Court of Appeals (*see United States Telephone Ass'n. v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994)), and are not relied on in determining the forfeiture amount in this case.

[5] In 1989, Congress amended Section 503(b) of the Communications Act. Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989). Among other things, the amendment increased the dollar amounts of this agency's forfeiture authority, to better serve as a meaningful sanction and deterrent to others. *See* Budget Reconciliation Act, House Conf. Rep. No. 386 at 435, *reprinted in* 1989 U.S. Code Cong. & Ad. News at 3038.

[6] The *Salem Broadcasting, Inc.*, decision does not clearly delineate what portion of this forfeiture was assessed for the unauthorized transfer of control, and what portion was assessed for the main studio rule violation.

[7] Simultaneously herewith, a Notice of Apparent Liability is being issued to FBDC for its part in the unauthorized transfer of control of Station KKMX.

may be pertinent." 47 C.F.R § 1.80(f)(3). Other relevant provisions of Section 1.80 are summarized in the attachment to this Notice.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

cc: Mr. Robert W. Larson
Dr. Michael Markham
Patricia A. Mahoney, Esquire
Melodie A. Virtue, Esquire
David D. Oxenford, Esquire

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 26, 1995

Released: August 3, 1995

IN REPLY REFER TO:
1800C1-RHW
92020172

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Robert W. Larson
FM Broadcasters of Douglas County
Former Licensee of Station KKMX, Tri City, Oregon
P.O. Box 1555
Myrtle Creek, Oregon 97457

Dear Mr. Larson:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE against FM Broadcasters of Douglas County ("FBDC") pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Communications Act"), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules. As set forth herein, it appears that FBDC engaged in an unauthorized transfer of control of Station "KKMX(FM), Tri City, Oregon,[1] to Brooke Communications, Inc. ("Brooke"), licensee of Station KRSB(FM), Roseburg, Oregon, without prior Commission consent, in violation of Section 310 of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules.

This apparent unauthorized transfer of control of Station KKMX was brought to the Commission's attention in connection with an assignment of license proceeding involving the station. An application was filed May 11, 1992, seeking Commission consent to assign the license of KKMX from FBDC to Tri City Communications, Inc. ("TCC") (File No. BALH-920511HT). A Petition to Deny that application was filed by Douglas County Tricasters, Inc. ("Douglas County"), licensee of Station KRNR(AM), Roseburg, Oregon, which alleged, *inter alia:* (1) that FBDC had, starting in January 1991 and continuing through December 1991, engaged in an unauthorized transfer of control of KKMX to Brooke;[2] and (2) that the proposed assignee, TCC, was actually under the control of Brooke. By Letter dated March 12, 1993, from Larry D. Eads, Chief, Audio Services Division (hereafter "Letter Ruling"), the Petition to Deny was granted in part and denied in part, and the assignment of license application was granted. The Letter Ruling made the tentative finding that an unauthorized transfer of control of KKMX from FBDC to Brooke had taken place during 1991, but was not an impediment to the grant of the assignment application in this case. However, the matter was referred to the Mass Media Bureau's Enforcement Division for further investigation. The grant of the assignment application was made without prejudice to whatever further enforcement action the Commission may deem appropriate regarding the apparent unauthorized transfer of control.

On February 1, 1995, the Commission sent letters of inquiry to FBDC and to Brooke seeking further information regarding the operations of KKMX.[3] On March 17, 1995, Brooke submitted a comprehensive response to its letter of inquiry. FBDC did not respond to its letter of inquiry. A second letter was sent to FBDC on June 9, 1995, demanding a response to the earlier letter of inquiry, and this second letter -- sent to FBDC at its official mailing address -- was returned to the Commission. However, we believe that we have sufficient information to resolve the issues relating to the alleged unauthorized transfer of control of the station from FBDC to Brooke in 1991, based on the information that was submitted in the assignment of license proceeding and on the information submitted by Brooke in response to the letter of inquiry relating to the 1991 KKMX operations.

Section 310(d) of the Communications Act states, in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. § 310(d). Section 73.3540(a) of the Commission's Rules states that "[p]rior consent of the FCC must be obtained for a voluntary assignment or transfer of control."

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[1] By letter dated February 19, 1992, the Commission was advised that the licensee of Station KKMX, formerly known as Gee Jay Broadcasting, Inc., had changed its business name to "FM Broadcasters of Douglas County." In addition, prior to May 15, 1993, and during the period in which FBDC was licensee, the call sign for Station KKMX was KTRQ-FM. However, for ease of reference, we will henceforth refer to the station by its present call sign, KKMX.

[2] Station KKMX and Brooke's Station KRSB(FM), Roseburg, Oregon, serve substantially the same area. Brooke is 100% owned by the William E. Markham Trust, whose sole beneficiary is William E. Markham. Brooke's President, Treasurer, and sole Director is one of William Markham's sons, Patrick Markham. Patrick Markham is also the majority stockholder, President, Treasurer, and Director of Markham Broadcasting, Inc., licensee of Station KQEN(AM), Roseburg, Oregon, which is operated in common with and from the same studios as Station KRSB.

[3] In addition, in view of allegations regarding control of TCC by Brooke following the consummation of the assignment on April 8, 1993, the Commission included in its letter of inquiry to Brooke certain questions regarding the operation of KKMX after the assignment. The Commission also sent a separate letter of inquiry to TCC on February 1, 1995, to determine whether a second unauthorized transfer of the station from TCC to Brooke had taken place after consummation of the assignment.

There is no exact formula by which control of a broadcast station can be determined. In ascertaining whether a transfer of control has occurred, we traditionally look beyond the legal title to whether a new entity or individual has obtained the right to determine the basic operating policies of the station. *See WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming, and finances, cannot be delegated. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981). *See also Salem Broadcasting, Inc.*, 6 FCC Rcd 4172 (MMB 1991).

Based on the response to the Commission's February 1, 1995, letter of inquiry and other relevant documentation submitted in connection with the assignment of license proceeding, it appears that from January 18, 1991, to December 8, 1991, FBDC and Brooke engaged in an unauthorized transfer of control of Station KKMX. The facts leading to this conclusion are as follows.

First, FBDC and Brooke on January 18, 1991, entered into a "Station Service Agreement" whereby Brooke agreed to broker substantially all the time on KKMX. Under that Agreement, Brooke undertook all commercial time sales and programming operations of the station, with the exception of a single, regularly-scheduled public affairs program that was apparently produced by Robert Larson, the President and majority stockholder of FBDC,[4] until approximately September of 1991. In addition, as part of the Station Service Agreement, FBDC sold all the station's studio and transmitting equipment to Brooke for $35,000 in cash, and Brooke then leased back that equipment to FBDC for the nominal amount of $100 per month (which FBDC stopped paying in August 1991). The Station Service Agreement specified that it could be cancelled by either party upon one year's notice, but that such cancellation by FBDC would be effective, "at the option of Brooke, upon the repurchase by [FBDC] of the assets . . . at fair market value." The Agreement further specified that Brooke would pay FBDC a monthly fee of $1100 for the right to broker the station. On the same date, Brooke and FBDC entered into an "Option Agreement" for the purchase and sale of the station for $65,000. On June 17, 1991, this option was assigned by Brooke to TCC, which subsequently exercised it to initiate the assignment of license application later filed with the Commission.

With respect to programming, an Agreement with Satellite Music Network for satellite-delivered country music programming was executed on behalf of FBDC on January 23, 1991, by Stanley G. King, who was apparently an officer of FBDC's predecessor. Mr. Larson, the President and majority owner of FBDC, later claimed that this Agreement was arranged by Brooke and was entered into without his knowledge or consent. It is uncontested, however, that this satellite music format was broadcast by the station starting on or about March 3, 1991, and continuing through December 8, 1991, and that Brooke made all payments to Satellite Music Network pursuant to the Agreement. Communications with Satellite Music Network regarding the implementation of the new format were conducted on behalf of the station by Patrick Markham and other employees of Brooke.

With regard to Station KKMX's personnel, as of the date the Station Service Agreement was executed, January 18, 1991, FBDC had four employees, including Robert Larson. All four employees, including Larson himself, were then placed on Brooke's payroll, and Brooke paid their salaries until they were all terminated effective March 2, 1991. Although Mr. Larson was also removed from Brooke's payroll on that date, a further agreement was entered into between Larson and Brooke on April 8, 1991, whereby Larson, in return for the payment from Brooke of $200 per month, agreed to perform certain services to "preserve and enhance the license" for the station, including license renewal matters, program monitoring, preparation of local programming material, review of station logs and FCC filings, review of technical operations, and acting as a liaison between Brooke and FBDC. According to Brooke, Mr. Larson was present at the KKMX studios one to three days per week for varying periods of time from March to September 1991 to review logs and billing and to prepare public affairs programming, an estimate which Mr. Larson disputed (in a statement he supplied to Douglas County in support of its Petition to Deny) as overstating his continued involvement with the station.

At the same time that the station began broadcasting the Satellite Music Network programming, early March 1991, Brooke moved all the KKMX studio equipment from FBDC's main studio in Myrtle Creek, Oregon, closed down the Myrtle Creek main studio, and began operating KKMX from new studios in a building owned by Brooke adjacent to Brooke's KRSB studios. KKMX's main studio was thereafter staffed full-time by Brooke employees from March 3 to December 1991, and part-time by Mr. Larson when he happened to be present there as described above. The station's telephone was answered by a Brooke employee during this period. KKMX's Quarterly Issues/Programs Lists, required by Section 73.3526(a)(9) of the Commission's Rules, were prepared by Brooke's President, Patrick Markham.

Regarding the finances of the station, subsequent to the execution of the Station Service Agreement, and until December 1991, all operating expenses of KKMX (other than the $100 per month equipment lease payment) were paid by Brooke, including all station public utility and telephone expenses, programming expenses, studio rent (until the KKMX main studio was moved to Brooke's building adjacent to KRSB's studios, for which no rent was paid), station liability insurance, and music licensing fees. By the end of 1991, however, the relationship between FBDC and Brooke deteriorated, and by letter dated December 4, 1991, FBDC advised Brooke that it was preempting all further programming on KKMX. Brooke turned off the station on December 8, 1991. The station remained dark until June 1993, subsequent to the consummation of the assignment of license to TCC.

[4] A Form 323 Ownership Report for KKMX dated January 17, 1991, listed Robert Larson as 90% stockholder of FBDC's predecessor, Gee Jay Broadcasting, Inc. A subsequent Form 323 dated October 24, 1992, for FBDC listed Mr. Larson as 100% stockholder.

In addition, Douglas County supplied with its Petition to Deny a written statement dated July 24, 1991, from FBDC's President, Robert Larson, asserting that Brooke had taken control of the station from FBDC. This statement made the following assertions:

> The station service agreement stated that I am able to perform my duties, but Brooke Communications has made it difficult if not impossible to approve or disapprove program materials submitted for broadcast and logs are signed off up to seven days after broadcast and not before broadcast. I have not been given the opportunity to provide management personnel to oversee day-to-day operations. I am not allowed to sell broadcast time on [KKMX] and have not produced any commercials for the station from February 1991 to present.
>
> I am Chief Operator of record, but as of this date I have not been allowed to perform this task. I have expressed a dissatisfaction with the programming that has been aired, such as sports, news and music formats and have not been allowed to make decisions to suspend, cancel or delete such programming.

Douglas County subsequently supplied a second statement from Mr. Larson dated July 13, 1992, with its Reply to Opposition to the Petition to Deny. In this second statement, Mr. Larson asserted that although the Satellite Music Network programming Agreement was signed on behalf of FBDC by Stan King, who had been an officer of FBDC's predecessor, that Agreement was executed without Larson's consent, and King had no authority to execute it. In addition, Larson's second statement asserted that Brooke, without Larson's approval, had moved the KKMX main studio from its original location in Myrtle Creek to Brooke's building adjacent to Brooke's KRSB studios. Finally, Larson's statement asserted that he did not go to the KKMX\KRSB studios nearly as often as asserted by Brooke to review programming or other matters, and that the diary entries submitted by Brooke to establish that Larson had made more frequent appearances at the relocated main studio were inaccurate.

Although Mr. Larson supplied his statements to Douglas County to support the contention that control of the station was improperly wrested from him by Brooke against his wishes, we conclude that FBDC and Brooke together participated in a joint effort to transfer control of the station, without prior Commission consent, beginning in January 1991, when FBDC sold all its broadcasting equipment to Brooke and Brooke assumed all primary responsibility for the financial, programming, and personnel-related obligations of the station. It thus appears that FBDC ceded control, and Brooke exercised predominant control, over the operations of Station KKMX from January 18, 1991, to December 8, 1991, in willful violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules. We do not believe that this violation puts in issue the basic qualifications of FBDC to hold a Commission license; rather, we believe that a monetary forfeiture is the appropriate sanction. To determine the appropriate amount of the forfeiture for this violation, we will directly apply to the specific circumstances of this case the relevant statutory factors in Section 503(b)(2)(D) of the Communications Act, including the nature, circumstances, extent, and gravity of the violations. Our past decisions that predated the *Policy Statement, Standards for Assessing Forfeitures*,[5] and intervening legislative changes,[6] will also be relevant to this determination.

To determine the appropriate monetary forfeiture for FBDC's unauthorized transfer of control, we have reviewed the precedent and compared the seriousness of this violation with those in other cases. In *Salem Broadcasting, Inc., supra*, 6 FCC Rcd 4172, 4173, the licensee was fined $10,000 for an unauthorized transfer of control and a main studio rule violation that existed for a period of approximately ten months.[7] *Salem*, like the present case, involved a brokerage/programming agreement that, as effectuated, was determined to constitute an unauthorized transfer of control. In *Silver Star Communications-Albany*, 6 FCC Rcd 6905 (1991), the licensee of an AM/FM combination was fined $20,000 for an unauthorized transfer of control of the two stations over a period of 18 months. In *First Broadcasting Corp.*, 3 FCC Rcd 2758 (1988), the licensee of an AM station was fined $20,000 for an unauthorized transfer of control effectuated through unreported stock transactions. Although the licensee filed an assignment application two years after the stock transactions took place seeking *nunc pro tunc* approval of the transfer, the $20,000 forfeiture was assessed for the full six year period that the unauthorized transfer continued. In *Cate Communications Corp.*, 60 RR 2d 1386 (1986), a forfeiture of $20,000 was affirmed by the Commission for the unauthorized transfer of control of an AM station for a period of 13 months.

In view of the above, pursuant to Section 503(b) of the Communications Act, FM Broadcasters of Douglas County is hereby advised of its apparent liability for a forfeiture of Ten Thousand Dollars ($10,000.00) for its willful and repeated violation of Section 310(d) of the Communications Act and Section 73.3540 of the Commission's Rules.[8] In regard to this forfeiture, FBDC is afforded a period of thirty (30) days from the date of this Notice "to show, in writing, why a forfeiture penalty should not be imposed or pay the forfeiture. Any showing as to why the forfeiture should not be imposed or reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R § 1.80(f)(3). Other relevant provisions of Section 1.80 are summarized in the attachment to this Notice.

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[5] 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) ("Policy Statement"). These forfeiture standards were set aside by the United States Court of Appeals (*see United States Telephone Ass'n. v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994)), and are not relied on in determining the forfeiture amount in this case.

[6] In 1989, Congress amended Section 503(b) of the Communications Act. Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989). Among other things, the amendment increased the dollar amounts of this agency's forfeiture authority, to better serve as a meaningful sanction and deterrent to others. *See* Budget Reconciliation Act, House Conf. Rep. No. 386 at 435, *reprinted in* 1989 U.S. Code Cong. & Ad. News at 3038.

[7] The *Salem Broadcasting, Inc.*, decision does not clearly delineate what portion of this forfeiture was assessed for the unauthorized transfer of control, and what portion was assessed for the main studio rule violation.

[8] Simultaneously herewith, a Notice of Apparent Liability is being issued to Brooke for its part in the unauthorized transfer of control of Station KKMX.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

cc: Patricia A. Mahoney, Esquire
Melodie A. Virtue, Esquire
David D. Oxenford, Esquire

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

REQUEST BY THE COUNTY OF CLACKAMAS, OREGON — CSR-4516-R

For a Declaratory Order Regarding
the A La Carte Package of Falcon Cablevision

MEMORANDUM OPINION AND ORDER

Adopted: July 28, 1995; Released: August 3, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. This proceeding involves a Request for Declaratory Ruling ("Request") filed by the Clackamas County Office of Cable Communications and Franchise Management ("the County"). The County requested that the Commission issue an order determining the regulatory status of two a la carte packages offered by Falcon Cablevision ("Falcon") in Clackamas County, Oregon.[1] Falcon has responded to the County's Request.[2] For the reasons set forth below, we grant the County's Request and find that the two a la carte packages may be treated as new product tiers under the Commission's rules.

II. FACTS

2. According to Falcon's Response, the Falcon a la carte services at issue were first offered to subscribers on September 1, 1993, when Falcon restructured the service offerings on its systems serving the Clackamas County franchise area. Falcon serves the area from two separate headends, the Wemme headend and the Boring/Sandy headend. Prior to September 1, 1993, Falcon offered on the Wemme system a 6 channel basic tier, called Broadcast Basic, for $10.95 per month, an 8 channel cable programming service ("CPS") tier, called Basic Tier 1, for $10.60 per month, and an additional 8 channel CPS tier, called Tier Three, for $6.00 per month. All three tiers of service could be purchased together for $27.55 per month. As of September 1, 1993, Falcon restructured its service offerings on the Wemme system to eliminate the two CPS tiers and to offer a 20 channel basic tier for $23.60 per month. The restructured basic tier was made up of the 6 channels previously on the basic tier, the 8 channels previously on Basic Tier 1, 4 of the channels from the former Tier Three, plus 2 new channels. Falcon also began offering 5 channels (3 channels previously available on Tier Three plus 2 new channels) individually for $2.00 each or as a package for $2.95.[3] Falcon's basic tier and a la carte package could be purchased together for $26.55 per month.

3. On the Boring/Sandy system prior to September 1, 1993, Falcon offered a 6 channel basic tier, called Broadcast Basic, for $10.95 per month, and three CPS tiers: a 10 channel tier, called Basic Tier 1, for $10.60 per month; an 8 channel tier, called Tier Three, for $6.00 per month; and a 7 channel cable programming service tier, called Tier Four, for $6.00 per month. All four tiers of service could be purchased together for $33.55 per month. As of September 1, 1993, Falcon restructured its service offerings on the Boring/Sandy system to eliminate all three CPS tiers and to offer a 25 channel basic tier for $25.75 per month.[4] Falcon also began offering six channels (four channels previously available on Tier Four plus two channels previously available on Tier Three) individually for $2.00 each or as a package for $2.95.[5] Falcon's basic tier and a la carte package could be purchased together for $28.70 per month.

4. In addition to the offerings described above, Falcon stated in its August 30, 1993, notice to subscribers announcing its restructuring that it would be offering USA Network for the firsttime on the systems as an a la carte channel and as part of the a la carte package on each system effective September 1, 1993. However, in its Response, Falcon explained that although it had intended to offer USA Network individually and as part of an a la carte package, it was unable to offer the service individually due to contractual arrangements.[6] As a result, Falcon states that it never offered USA Network either individually or as part of an a la carte package.[7] Falcon also stated that, as of the date of its Response, USA Network was being provided to all subscribers "on a free preview basis."[8]

III. DISCUSSION

5. The regulatory status of offerings similar to those offered by Falcon has previously been addressed by the Commission. For example, in *Falcon Cable TV*, 10 FCC Rcd 998 (Cab. Serv. Bur., 1994) ("*Falcon Port Orchard*"), we resolved the regulatory status of a similar a la carte offering by a Falcon system in Port Orchard, Washington. In *Falcon Port Orchard*, the cable operator restructured its offering to eliminate two CPS tiers and to offer six chan-

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[1] The County filed its Request by letter dated May 12, 1994, and amended it by letter dated June 24, 1994. On September 12, 1994, the County petitioned the Commission to review Falcon's benchmark rate justification. *See* County's Petition for Special Relief (Request for FCC Review of Falcon Cablevision 1200, 1205, 1215 Filing for Clackamas County, OR and Community Identification OR0162 & OR0323) (dated Sept. 12, 1994). By letter dated May 3, 1995, the County indicated that it would withdraw its benchmark special relief petition once the Commission issues an order resolving its Request on the a la carte issue.

[2] *See* Response of Falcon Cablevision (filed May 30, 1995) ("Response").

[3] Falcon reduced the price for individual a la carte channels to $1.10 each effective March 18, 1994.

[4] On October 1, 1993, the price for the basic tier was increased to $26.17 per month.

[5] Falcon reduced the price for individual a la carte channels to $0.95 each effective March 18, 1994.

[6] *See* Response at 2.

[7] *Id.* at 3.

[8] *Id.*

nels which had previously been offered as part of a regulated tier on an individual or package basis. In that case, although it appeared that the restructuring may have had the effect of avoiding rate regulation based on the fact that Falcon had removed channels from an otherwise rate regulated tier to create a new package of channels, the Bureau stated that it could not say that it was clear that Falcon's collective offering was not a permissible a la carte package.[9] As a result, the Bureau said it would not be equitable to subject the operator to refund liability on account of the restructuring.[10] The Bureau determined that Falcon could treat the package as a new product tier under the Commission's *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd 1226 (1994) (*Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*) ("*Going Forward Order*").[11]

6. Falcon's two Clackamas County a la carte packages are similar to the a la carte package which was the subject of our order in *Falcon Port Orchard*. In Clackamas County, Falcon removed a small number of channels from regulated tiers (and, on the Wemme system, two new channels were added) to create a la carte packages of five channels on the Wemme system and six channels on the Boring/Sandy system. The remaining CPS channels on the two systems were consolidated with the channels on the basic service tier. In *Falcon Port Orchard*, six channels were moved from one the of the operator's CPS tiers to create an a la carte package and the remaining CPS channels were consolidated with those on the basic tier. There are no facts in the record of this case that materially distinguish Falcon's Clackamas County offerings from those in *Falcon Port Orchard*. Accordingly, in terms of their regulatory status, Falcon's packages at issue in this case should be treated similarly to the package at issue in *Falcon Port Orchard*. Accordingly, we find that Falcon's a la carte packages, as they existed on May 12, 1994, the date of the County's Request, may be treated as new product tiers under the Commission's *Going Forward Order*.

IV. ORDERING CLAUSE

7. Accordingly, the County's Request IS GRANTED insofar as it requests the issuance of an order declaring the regulatory status of a la carte packages offered by Falcon Cablevision. The packages at issue may be treated as new product tiers under the Commission's *Going Forward Order*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[9] *Falcon Port Orchard* at ¶ ¶ 18-19.
[10] *Id.* at ¶ 21.
[11] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATIONS SERVICES, INC. — File No. I-T-C-95-322(AL)

Application for authority to transfer control of ALC Communications Corporation to Frontier Corporation.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: July 26, 1995; Released: August 3, 1995

By the Chief, Telecommunications Division:

1. Allnet Communications Services, Inc. (Allnet) and Frontier Corporation (Frontier), pursuant to Section 214 of the Communications Act of 1934, as amended, submitted the above-captioned application requesting authority to transfer control of Allnet's parent corporation, ALC Communications Corporation (ALC) and, in turn, of Allnet, to Frontier. The application was placed on public notice on May 23, 1995. No comments were received.

2. Allnet, a Michigan corporation, is a wholly-owned subsidiary of ALC, a Delaware corporation. Allnet is authorized, pursuant to several Section 214 authorizations,[1] to provide resale of international switched services, resale of private lines interconnected with the public switched network between the United States and the United Kingdom, as well as faciliites-based services between the United States and Canada, Hong Kong and the United Kingdom. Allnet is affiliated with Allnet Communications Ltd. (ACL), a foreign carrier as defined in Section 63.01(r)(1)(ii) of the Commission's Rules. Allnet, however, has certified that it will not accept any special concession directly or indirectly from any foreign carrier or administration with respect to traffic flows between the United States and the United Kingdom and will not enter into such agreements in the future.

3. Frontier, a New York corporation, is the parent corporation of local telephone company subsidiaries in 13 states and long distance companies certificated in many states. Frontier's wholly-owned subsidiary, Frontier Communications International, Inc. (FCI) (formerly RCI Long Distance, Inc.) is authorized, pursuant to Section 214, to provide various international services, including switched services and facilities-based services to various points. Other subsidiaries of Frontier also hold Section 214 authorizations.

4. Allnet, Frontier and ALC believe that they will realize significant economic and marketing efficiencies by establishing Allnet as an indirect wholly-owned subsidiary of Frontier. They state that Frontier's acquisition of Allnet will allow Frontier to accelerate its plans to expand long distance services and improve service to the public. In addition, they state that Allnet's customers will continue to receive high-quality communications services. Accordingly, ALC and Frontier have negotiated an Agreement and Plan of Merger. After completion of the entire transaction, ALC will be a subsidiary of Frontier and Allnet will remain a subsidiary of ALC. The transaction will result in a change of the ultimate corporate parent of Allnet.

5. In view of the foregoing, we conclude that grant of the instant application will serve the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED that the application of Allnet Communications Services, Inc., File No. I-T-C-95-322(AL) IS GRANTED, and Allnet and Frontier are authorized to transfer control of Allnet's parent corporation, ALC, to Frontier.

7. IT IS FURTHER ORDERED that all terms and conditions of any Commission orders granting authority to Allnet or any other subsidiary of ALC to provide common carrier services remain the same.

8. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] See Order, Authorization and Certificate released August 9, 1985 (File No. I-T-C-85-126); Order, Authorization and Certificate released October 27, 1987, 2 FCC Rcd 6633 (File No. I-T-C-87-113); Order, Authorization and Certificate released December 9, 1987, 2 FCC Rcd 7291 (File No. I-T-C-87-179); Order, Authorization and Certificate released January 25, 1988, 3 FCC Rcd 333 (File No. I-T-C-88-013); Order, Authorization and Certificate released August 23, 1988, 3 FCC Rcd 5102 (File No. I-T-C-88-152); Report No. I-8063, released June 14, 1995, Public Notice of Actions Taken (File No. I-T-C-95-295).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. ITC-92-152

MCI TELECOMMUNICATIONS CORP. — File No. ITC-92-153(A)

GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED — File No. ITC-92-158

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. ITC-91-215(A)

Applications for Authority to establish channels of communication between the United States and Vietnam on a Switched Transit Basis

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. ITC-92-080

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. ITC-92-154

MCI TELECOMMUNICATIONS CORP. — File No. ITC-92-167

GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED — File No. ITC-92-206

Applications for Authority to establish channels of communication between the United States and Cambodia on a Switched Transit Basis

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. ITC-92-195

Application for Authority to establish channels of communication between the United States and Laos on a Switched Transit Basis

MEMORANDUM OPINION, ORDER & AUTHORIZATION

Adopted: July 26, 1995; Released: August 3, 1995

By the Chief, Telecommunications Division:

I. INTRODUCTION

1. In this order, we dismiss as unnecessary several applications for Section 214 authority to provide service between the United States and Cambodia, Laos or Vietnam on an indirect, switched transit basis. We find the carriers' existing authorizations to serve Australia, Japan, Singapore and Hong Kong give them all the authority they need to transit their traffic through these points to Cambodia, Laos or Vietnam. We also grant Sprint Section 214 authority to serve Cambodia and Laos on a direct, facilities basis. This authorization enables Sprint, as a nondominant carrier, to establish direct circuits to these countries at a future date without seeking additional Commission authority.

II. BACKGROUND

2. The captioned applications seek authority, under Section 214 of the Communications Act, as amended,[1] to establish international common carrier service between the United States and Cambodia, Laos or Vietnam on an indirect, switched transit basis. Indirect, switched transit traffic, while often referred to generally as "transit traffic," is traffic that is switched through an intermediate country, where the United States is one of the terminal points.[2] Four of these applications request authority to serve points for which the applicants have never received authorization, either on a transit or direct, facilities basis.[3] Two applications[4] seek authority to use transiting to serve a point for which the applicants subsequently sought and received authority to serve on a direct, facilities basis.[5] The remaining three applications seek authority to use transiting to serve a point for which the applicants had previously sought and,

[1] 47 U.S.C. § 214.

[2] All transiting referred to in this order relates solely to indirect transit traffic (hereinafter, "indirect" or "transit" traffic). *See Implementation and Scope of the International Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (Feb. 7, 1986) (*ISP Order*), *modified in part on recon.*, 2 FCC Rcd 1118 (1987) (*ISP Reconsideration*), *further recon.*, 3 FCC Rcd 1614 (1988).

[3] American Telephone and Telegraph Company (AT&T), File No. ITC-92-154 (Cambodia); GTE Hawaiian Telephone Company, Inc. (GTE), File No. ITC-92-206 (Cambodia); and US Sprint Communications Company Limited Partnership (Sprint), File Nos. ITC-92-080 (Cambodia) and ITC-92-195 (Laos). In File Nos. ITC-92-080 and ITC-92-195, Sprint appears to request authority to establish service to Cambodia and Laos on a direct, facilities basis and to use transiting as an initial means to serve these countries. Each of these applicants has been authorized to provide service to the referenced countries under grant of special temporary authority from the Commission.

[4] GTE, File No. ITC-92-158 (Vietnam); MCI Telecommunications Corp. (MCI), File No. ITC-92-167 (Cambodia).

[5] The Common Carrier Bureau granted GTE direct authority to Vietnam on April 23, 1993, 8 FCC Rcd 2791 (File No. ITC-93-040). It granted MCI direct authority to Cambodia on July 11, 1994, 9 FCC Rcd 3260 (File No. ITC-94-250).

in the interim, been granted authority to serve on a direct, facilities basis.[6] The applications were placed on public notice and no comments were filed.

III. DISCUSSION

3. These applications raise the issue whether a Section 214 applicant's prior authorizations to serve particular foreign countries give the applicant sufficient authority to serve other countries by transiting through those intermediate points. The applicants claim that a request for Section 214 authority for indirect routing to a final destination country is unnecessary if the carrier has a Section 214 certificate to a transit point in an intermediate country, and the authorization also allows service "and beyond" the transit point. They assert that their existing authorizations to serve Australia, Japan, Singapore and Hong Kong "and beyond" give them all the authority they need to serve Vietnam, Cambodia, or Laos by routing traffic through the authorized points (Australia, etc.) to these final destination countries. The carriers claim that, under the "and beyond" authority, a carrier need not apply for formal Section 214 authority to serve a destination point via a transit country when they have authority to the transit country "and beyond." The applicants argue further that switched transiting is permissible even when the words "and beyond" do not appear in the carrier's authorization for the intermediate country.[7]

4. The Commission recently clarified that its rules and policies permit carriers to provide service on an indirect, switched transit (or "and beyond") basis through intermediate countries which they are authorized to serve on a direct, facilities basis, regardless of whether the carriers have Section 214 authority to serve the ultimate destination country.[8] The Commission noted that this general rule does not apply where a carrier's Section 214 certificate for the intermediate country prohibits routing of traffic beyond that point, whether generally or to specific terminal points. We therefore dismiss as unnecessary those captioned applications that merely request authority to provide service on an indirect, switched transit basis via the carriers' direct circuits to previously-authorized foreign points.[9] The applicants may transit their traffic to Cambodia, Laos or Vietnam (or any destination country) through direct circuits to previously-authorized foreign points without obtaining additional Section 214 authority. This general rule is subject to the proviso that the applicants may not transit their traffic through any intermediate country for which indirect or "and beyond" routing is prohibited by their Section 214 authorization for such point.

5. Sprint's Section 214 applications to provide service on a switched transit basis to Cambodia and Laos state that Sprint will use switched transit as an initial means to serve these destination countries. Sprint suggests that it may add direct circuits to both countries at a future date. We therefore grant Sprint authority to serve both countries on a direct facilities basis. As a nondominant carrier on both the U.S.-Cambodia and U.S.-Laos routes, Sprint may acquire direct circuits on these routes subject to notifying the Commission of such circuit additions in Sprint's annual circuit status reports.[10]

IV. ORDERING CLAUSES

6. Accordingly, for the reasons set forth herein, IT IS ORDERED that the applications filed by American Telephone and Telegraph Company, File No. ITC-92-152, MCI Telecommunications Corp., File No. ITC-92-153(A), GTE Hawaiian Telephone Company Inc., File No. 92-158 and US Sprint Communications Company L.P., File No. ITC-91-215(A) to establish channels of communication between the United States and Vietnam on a switched transit basis; and the applications filed by American Telephone and Telegraph Company, File No. ITC-92-154, MCI Telecommunications Corp., File No. ITC-92-167, and GTE Hawaiian Telephone Company, Inc., File No. ITC-92-206, to establish channels of communication between the United States/Hawaii and Cambodia on a switched transit basis are hereby DISMISSED.

7. IT IS FURTHER ORDERED that the applications of US Sprint Communications Company, L.P. (US Sprint), File Nos. ITC-92-080 and ITC-92-195, ARE GRANTED and US Sprint is authorized to establish direct service between the United States and Cambodia and the United States and Laos, respectively, for the provision of its authorized common carrier services.

8. IT IS FURTHER ORDERED that neither US Sprint nor any persons or companies directly or indirectly controlling or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, that is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which US Sprint or any persons or companies controlling or controlled by it are parties.

9. IT IS FURTHER ORDERED that US Sprint's provision of private line service under this authorization is limited to the provision of such private lines only between the United States and Cambodia or Laos -- that is, private lines that originate in the United States and terminate in Cambodia or Laos, or that originate in Cambodia or Laos and terminate in the United States. In addition, US Sprint may not -- and its tariffs must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign

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[6] AT&T, File No. ITC-92-152; MCI, File No. ITC-92-153(A); and Sprint, File No. ITC-91-215(A) (Vietnam). The Sprint application was granted in part by the Memorandum Opinion, Order and Authorization, 7 FCC Rcd 2891 (Int. Fac. Div. 1992), that authorized AT&T (File No. ITC-92-041), MCI (File No. ITC-92-074), and Sprint to serve Vietnam on a direct basis. Because Sprint could not then initiate direct service it sought and was granted Special Temporary Authority to serve Vietnam on a transit basis. The portion of the Sprint application before us now requests permanent authority to serve Vietnam on a transit basis.

[7] *See, e.g.*, AT&T Application File No. ITC-92-152 at 3.

[8] *See Streamlining the International Section 214 Authorization Process and Tariff Requirements*, IB Docket No. 95-118, Notice of Proposed Rulemaking, FCC 95-286, released July 17, 1995, at ¶ 17.

[9] *See* ¶ 6, *infra*, for a list of those applications that we dismiss as unnecessary.

[10] *See Rules for the Filing of International Circuit Status Reports*, CC Docket No. 93-157, Report and Order, FCC 95-280, adopted July 12, 1995, at ¶ 10.

end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

10. IT IS FURTHER ORDERED that US Sprint shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

11. IT IS FURTHER ORDERED that US Sprint shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

12. IT IS FURTHER ORDERED that US Sprint shall file with the Commission copies of any operating agreements it enters into with its foreign correspondents within 30 days of the execution of the agreements, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

13. This order is issued under Section 0.261 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. USP-94-W-327

MCI Telecommunications Corporation — File No. USP-94-W-323

Petitions for Waiver of the International Settlements Policy for a Change in the Accounting Rate with the Dominican Republic

ORDER ON RECONSIDERATION

Adopted: July 31, 1995; Released: August 3, 1995

By the Chief, International Bureau:

1. Telepuerto San Isidro, S.A. d/b/a Tricom, a Dominican carrier licensed to provide telecommunications services in the Dominican Republic, requests that the Bureau reconsider and amend an order granting American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI) a waiver of the Commission's International Settlements Policy. For the reasons discussed below, we deny Tricom's petition. By this action, we further the Commission's goal of achieving cost-based, nondiscriminatory accounting rates for common carrier services to and from the United States.

I. BACKGROUND

2. On September 26, 1994, the Chief of the International Facilities Division ("Division") of the Common Carrier Bureau granted AT&T and MCI waivers of the Commission's International Settlements Policy (ISP),[1] to change the accounting rate[2] for switched voice service with Compania Dominica de Telefonos C. por A ("Codetel"),[3] the major carrier in the Dominican Republic.[4] The Division permitted a growth-based accounting rate agreement with Codetel for switched voice service for the period April 1, 1994, through December 31, 1994. The agreement provided for an accounting rate of $1.30 per minute during the peak period (7 a.m to 12 a.m.), $0.60 per minute during the off-peak period (12 a.m. to 7 a.m.) and $0.60 per minute for all minutes exceeding certain volume thresholds. The threshold for AT&T was the first 32 million U.S. billed minutes of service in a yearly quarter; the threshold for MCI was the first 11 million U.S. billed minutes of service in a yearly quarter. In addition, a $1.00 surcharge for each received collect call to be paid to the non-billing administration applied. *See Waiver Order* at 5277.

II. PLEADINGS

3. Tricom now seeks reconsideration and asks the Commission to amend the *Waiver Order* to impose an accounting rate of between $1.05 and $1.10 per minute, an amount representing an average of the rates originally authorized in the *Waiver Order*. *See* Tricom Petition at ii, 3 - 4, 13. Tricom argues that this action is warranted because the grant of the AT&T and MCI waivers raises serious international antitrust concerns, impedes competition abroad, and constitutes a reversal of our pro-competitive policies. *See id.* at 3, 4, 6.

4. According to Tricom, in February 1994 the government of the Dominican Republic ordered Codetel to sign an interconnection agreement with Tricom.[5] *Id.* at ii, 5. Thereafter, Tricom entered into negotiations with AT&T and MCI for an operating agreement to provide service between the United States and the Dominican Republic in competition with Codetel.[6] Before concluding its negotiations with AT&T and MCI, however, Tricom states that Codetel concluded its own accounting rate agreement with these carriers, as reflected in AT&T's and MCI's May 12, 1994, requests for waivers of the Commission's ISP. *See id.* at ii, 6. Tricom alleges that the $0.60 reduced rate included in Codetel's agreements with AT&T and MCI resulted in the breakdown of Tricom's negotiations with AT&T and MCI. Id. at 6. Tricom alleges that, after Codetel presented its $0.60 offer for off-peak hours and all traffic exceeding the volume threshold, AT&T told Tricom that it would only accept a settlement rate of $0.60 "because the total of Tricom's traffic was equal to Codetel's 'incremental' traffic." *Id.* at iii; Tricom Reply at 4. Tricom maintains that both Codetel and AT&T knew that Tricom could not offer a $0.60 rate on all IMTS traffic and stay in business. Tricom Petition at 10; Reply at 4. Five days after the Division granted AT&T's and MCI's waiver requests permitting the growth-based, peak/off-peak accounting rate,

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[1] *See Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991) (*Phase 1 Report and Order*); *Reconsideration*, 7 FCC Rcd 8049 (1992)..

[2] An accounting rate is the per minute amount negotiated between a U.S. and foreign carrier to compensate each for their costs in originating and terminating each other's traffic on a particular U.S. international route. Historically, and as currently required under the Commission's ISP, the accounting rate is shared equally between the U.S. carrier and its foreign correspondent. For each minute of international telephone service that originates in the United States, the U.S. carrier owes the foreign carrier completing the call half the accounting rate (generally referred to as the "settlement rate"). The settlement rate is intended to reimburse the foreign carrier for the expenses it incurs completing the minute of telephone service that originates in the United States. Conversely, the foreign carrier owes half the accounting rate to the U.S. carrier for each minute of international telephone service that originates in its country and terminates in the United States. *See Second Report and Order*, 7 FCC Rcd at 8040, n.3.

[3] Codetel is a wholly owned subsidiary of GTE Service Corporation.

[4] *American Telephone and Telegraph Company and MCI Telecommunications Corp., Order and Authorization*, 9 FCC Rcd 5277 (IFD 1994) (*"Waiver Order"*).

[5] The interconnection agreement between Tricom and Codetel was ultimately signed on May 17, 1994. Tricom Petition at i - ii.

[6] During these negotiations, Tricom alleges, it proposed a settlement rate of $1.10 per minute, while AT&T countered with $0.90 per minute. *Id.* at 12; Tricom Reply at 4, n.7.

Tricom alleges, AT&T wrote and informed Tricom that it saw no further reason to negotiate with Tricom at the present time. Tricom Petition at iii, 6.

5. Tricom argues that Codetel's behavior constitutes predatory pricing violative of the U.S. antitrust laws. Tricom contends that the sudden decrease in the accounting rate only on certain traffic, the temporary application of the reduced rate (April 1, 1994 - December 31, 1994), and the fact that the reduction arose just after Codetel was forced by law to sign an interconnection agreement with Tricom, its new competitor, and just before Tricom consummated operating agreements with AT&T and MCI, demonstrate Codetel's anticompetitive efforts to keep Tricom from competing in the Dominican Republic. *Id.* at 3.

6. Tricom asserts that the waiver reduces the preexisting accounting rate of $1.29 per minute by 50 percent without any cost justification and was instituted for a short period of time to eliminate Tricom. It further contends that the *Waiver Order's* $0.60 accounting rate is below the low-end benchmark settlement rate range established by the Commission for the Americas region, and that the rates for the Americas more typically range from $1.25 to $1.50 or higher. Tricom Petition at 6-10. According to Tricom, the Commission denied a similar request by Communications Satellite Corporation, finding the price cut in that case to be predatory. *Id.* at 9, *citing Communications Satellite Corporation, Memorandum Opinion and Order*, 2 FCC Rcd 2420, 2421 (1987).

7. Finally, Tricom asserts that the waiver arrangement will deny U.S. carriers access to Dominican residents through a second and less expensive alternative carrier and will deny Dominican residents the ability to call the United States because of high prices. Tricom concludes that Codetel's attempt to maintain a monopoly will encourage distorted traffic flow between the two countries resulting in a higher U.S. trade deficit than would otherwise be the case. *Id.* at 12.

8. AT&T opposes Tricom's petition for reconsideration, stating that its agreement with Codetel is consistent in all respects with the Commission's ISP and is not anticompetitive. AT&T claims that Tricom is asking the Commission to preserve the prior, excessively high accounting rate arrangement between the United States and the Dominican Republic and to compel AT&T to pay that "grossly inflated" rate both to Tricom and Codetel. AT&T contends that, in negotiating with Tricom, its objective was to obtain an accounting rate level that would permit it to competitively price service to the Dominican Republic. AT&T argues that Tricom had ample opportunity to establish an operating agreement with AT&T, but that Tricom insisted on an accounting rate that reflected an insignificant reduction from the existing accounting rate that AT&T already had with Codetel. After negotiations with Tricom proved futile, AT&T states, it accepted Codetel's proposal to establish the growth-based arrangement at issue in this matter. AT&T Opposition at 1 - 5.

9. In addition, AT&T states that the limited term of the AT&T-Codetel agreement had nothing to do with the competitive impact on Tricom. AT&T maintains that it sought and received an accounting rate agreement that expired on December 31, 1994, and thereafter provides for the parties to negotiate a new accounting rate to be applied prospectively "in recognition of the rapidly changing competitive dynamics in the United States on that route."[7] *Id.* at 3, n.4.

10. AT&T further contends that Tricom fails to provide a persuasive reason why the U.S. public interest compels the Commission to investigate conduct between competing Dominican Republic carriers. More importantly, AT&T asserts, Tricom offers no demonstrable injury to U.S. customers or competition in the United States that would justify reversing the *Waiver Order*. *Id.* at 3, n.5. Finally, AT&T asserts that the COMSAT case cited by Tricom is not analogous to the matter at hand. In that case, AT&T submits, COMSAT's decision to reduce its rates prior to the entry of its competitor posed a potential harm to competition in the United States. *Id.*

11. MCI also opposes Tricom's petition, arguing that Tricom is using the Commission's processes as a vehicle to air its grievances with Codetel, and to ensure itself a "market share toehold" in the Dominican Republic. MCI further asserts that there is no U.S. policy mandating that U.S. carriers enter into operating agreements with foreign correspondents. MCI Opposition at 3.

III. DISCUSSION

12. ISP waiver requests that propose a lower international accounting rate may be approved upon a finding that the proposal results in: (1) a more cost-based accounting rate and (2) either a commitment to lower calling prices or some other public interest benefit. *See Regulation of International Accounting Rates*, 6 FCC Rcd 3552, 3554 (1991). In the *Waiver Order*, the Division found that the proposals submitted by AT&T and MCI would bring the accounting rate for service between the United States and the Dominican Republic closer to the benchmark range established by the Commission, and ultimately, to a level that reflects the cost of providing service. *See Waiver Order* at 5278. Further, the Division stated that it seemed "almost certain" that the proposed plan would result in a lower average payment per minute for both carriers than if the former agreement with Codetel had remained in effect for the entire year. *Id.* In this regard, the Division noted that recent data suggested that a growing portion of service to the Dominican Republic provided by AT&T and MCI would exceed, on average, their respective threshold levels, so each carrier stood to benefit from the lower accounting rate.[8] We find that the Division made a reasoned decision firmly grounded in established Commission policy, and we affirm the *Waiver Order*.

13. Tricom offers two principal reasons why the Bureau should reverse the *Waiver Order* and compel the U.S. carriers involved to pay Tricom's suggested average rate: (i) allowing the current decision to remain in effect will enable Codetel to predatorily price Tricom out of the market;

[7] To date, the International Bureau has not been notified of an alternate arrangement between Codetel and AT&T that governs this post-1994 period.

[8] *Waiver Order* at 5278, n.13 *citing 1992 Section 43.61 International Telecommunications Data*, Common Carrier Bureau, Industry Analysis Division, Dec. 7, 1993. This report presented the most recent international traffic data available at the time of the decision. According to this report, AT&T had 35.2 million and MCI had 11.5 million quarterly billed minutes, on average, to the Dominican Republic in 1993.

and (ii) supporting competition in the Dominican Republic is beneficial to U.S. end users. While we recognize the potential for concern raised by Tricom, it has not sufficiently supported its allegation of predatory pricing or demonstrated how reversing the terms of the *Waiver Order* would on balance benefit U.S. ratepayers.

14. Tricom has proffered no cost support for its assertion that the $0.60 rate on traffic exceeding the applicable thresholds approved by the Commission is predatory,[9] *i.e.*, that it is below the cost of providing service.[10] Tricom could have supported this allegation by offering some data about its costs of providing service including, at a minimum, the estimated cost of interconnection. Instead, Tricom supports its claim by reference to the accounting rates typically found in the Americas region and the benchmark settlement rates established by the Commission for that region. The Commission made clear in 1992 that such benchmark figures represent a "conservative estimate" of an "appropriate range" for settlement rates; that they are "guidelines" meant to be a "helpful target" to be used in the negotiations process between U.S. carriers and foreign correspondents."[11] Given the Commission's conclusion that $0.39 - $0.60 represents a conservative estimate for cost based settlement rates outside Europe, we cannot conclude that a settlement rate of $0.30 -- only $0.09 below the low end of this range -- is predatory. Moreover, Tricom's argument that accounting rates for the Americas typically range from $1.25 - $1.50 or higher only supports the conclusion that accounting rates for this region are still above the conservative benchmark range adopted by the Commission. For the same reason, we are not persuaded by Tricom's suggestion that AT&T was in effect a co-conspirator with Codetel in its alleged efforts to price predatorily because AT&T "knew" that Tricom could never meet Codetel's reduced offer of $0.60. This contention is unsupported by any record evidence, and at least facially, appears to be counter-intuitive. In general, a U.S. carrier would not appear to have a strong incentive to stifle or eliminate a competitor to a foreign monopolist because the U.S. carrier would benefit from such competition.

15. We agree with Tricom that a competitive market in the Dominican Republic should drive Dominican Republic calling prices closer to costs.[12] Lower calling prices should stimulate outbound traffic to the United States and reduce U.S. carriers' net settlement outpayments. As the Commission noted recently in the *Foreign Carrier Entry* Notice of Proposed Rulemaking, we support competition in other countries because this can result in benefits to U.S. consumers, such as reduced rates, increased quality, and new, innovative services, including the availability of global communications services.[13] We are not, however, convinced that reversing the *Waiver Order* and requiring a higher accounting rate will further these public interest benefits. Indeed, such action may directly harm U.S. carriers and consumers. We do not believe that foreign market competition should hinge on an apparent expectation of receiving revenues based on above-cost accounting rates for U.S. traffic. The accounting rate arrangement that AT&T and MCI negotiated with Codetel has directly and immediately lowered U.S. carriers settlement outpayments and is therefore consistent with our ISP policies and the U.S. public interest. Indeed, Tricom's presence in the market at the accounting rates it proposes would provide little direct contribution toward lower U.S. settlement outpayments and ultimately lower U.S. calling prices that competition in the Dominican Republic market could otherwise spur. In these circumstances, the best interests of U.S. ratepayers are served by permitting the lower accounting rate AT&T and MCI have negotiated with Codetel.

16. Tricom's claims of wrongdoing by Codetel are more appropriately raised with the government of the Dominican Republic, which has primary responsibility for the conduct of its carriers. Moreover, Codetel is not before us as a party to this proceeding. We do not believe that allegations against Codetel should lead us to abrogate an agreement that is favored by two U.S. carriers, consistent with growth-based rates approved in the past, and results in lower settlement rates.[14]

17. We are nonetheless concerned about Tricom's allegations of anticompetitive conduct. We recognize that, during the transition from a monopoly to a competitive environment, there is the potential for a foreign incumbent carrier to seek to thwart competition. Such misuse of market power is possible because the incumbent has a high market share of outbound traffic and bottleneck control of ubiquitous inbound termination facilities. Unlike a new en-

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[9] In the *Waiver Order*, the Division noted that the former accounting rate with Codetel was well above the U.S. world average rate, and higher than the rates with most other Caribbean points. *See, Waiver Order* at 5278. AT&T estimates that the former rates exceeded the competitive cost of supply by over 200 percent. *See* AT&T Opposition at 4. Reasoning from the premise that accounting rates for service with the Dominican Republic are high, perhaps as much as 200 percent above costs, we are not prepared to assume that reducing rates on certain traffic by 50 percent would render such rates predatory, rather than competitive.

[10] *See generally, Areeda & Turner, Predatory Pricing and Related Practices under Section 2D of the Sherman Act*, 88 Harvard Law Review 697 (1975).

[11] *See Regulation of International Accounting Rates, Second Report and Order and Second Further Notice Proposed Rulemaking*, 7 FCC Rcd 8040 at 8041, 8043 (1992).

[12] *See, e.g.*, Tricom Petition at 3 - 5, 8 and Tricom Reply at 2, where Tricom contends generally that: (i) supporting competition in the Dominican Republic protects and benefits U.S. ratepayers because competition leads to pricing toward cost; and (ii) the lack of competition abroad has created the settlements deficit.

[13] *See In the Matter of Market Entry and Regulation of Foreign-affiliated Entities*, IB Docket No. 95-22, Notice of Proposed Rulemaking, 10 FCC Rcd 4844, 4855 (1995).

[14] Tricom's reliance on *Communications Satellite Corporation*, 2 FCC Rcd 2420, 2421 (1980) (*Comsat*) is not well placed. In that case, the Common Carrier Bureau found that sufficient issues were raised to justify suspending and investigating tariff revisions to Comsat's discounted "Caribbean Business Service." Unlike Codetel, Comsat is clearly subject to our jurisdiction and must comply with specific regulations applicable to its tariff filings; among other things, the Bureau was considering whether Comsat's filing complied with those regulations. Further, Comsat's discounted service was offered in direct competition with U.S. satellite systems seeking to capture international traffic in the Caribbean Basin. *See Comsat* at 2420. Comsat later withdrew its tariff and the investigation was terminated as moot. *See Communications Satellite Corporation, Tariff FCC No. 103, Transmittal No. 630*, 2 FCC Rcd 5108 (1987). The presence of jurisdiction over the putative wrongdoer carrier, the applicability of specific tariffing requirements to Comsat, and the potential adverse impact on the U.S. telecommunications industry amount to substantial distinctions between *Comsat* and the matter at hand.

trant, an incumbent can leverage this strong market position to obtain a favorable accounting rate and operating agreement from U.S. carriers. These U.S. carriers generally seek to obtain return traffic from foreign carriers and need to terminate U.S. traffic in the foreign country, and thus have an incentive to cooperate with such a scheme. We are prepared to take action in a particular case where we are presented with evidence that there has been specific anticompetitive conduct by U.S. carriers. Based on the record in this proceeding, however, Tricom's claims are not subject to remedy by this Commission. Should the government of the Dominican Republic wish to consult with us in this matter, we are prepared to provide whatever assistance is appropriate.

18. Finally, we note that in the *Waiver Order* the Division placed specific requirements upon AT&T and MCI in the event either carrier returned to the Commission to request waivers to change the accounting rate with Codetel in the future. Specifically, the Division required that any rates proposed between now and the year 2000 be no higher than: (i) the rate in effect at the time the waiver is filed; (ii) the rates proposed in the petitions under review at the time the waiver is filed; or (iii) the rates in the former multi-year agreement, whichever is lowest. *See Waiver Order* at 5279. The foregoing safeguards will serve to protect against prospective rate increases and will further the Commission's goal of lowering international settlement rates.

19. Accordingly, IT IS ORDERED that the petition for reconsideration and amendment of the *Waiver Order* granting American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI) a waiver of the Commission's International Settlements Policy filed by Telepuerto San Isidro, S.A. d/b/a Tricom IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 91-1

In the Matter of

Amendment of Part 15 RM-8533
of the Commission's
Rules Relating to Television
Closed-Caption Decoding Circuitry

ORDER

Adopted: July 25, 1995; Released: August 3, 1995

By the Commission:

1. By this action, the Commission is granting a request by the Consumer Electronics Group of the Electronic Industries Association (EIA) for partial relief of the Commission's closed-caption decoder circuitry requirements for television receivers. Specifically, this action deletes the requirement that television receivers, manufactured after January 1, 1995, incorporate closed-caption decoder circuitry that is compatible with a cable television copy protection system developed by Eidak Corporation. This action will relieve electronics manufacturers and consumers of the burden involved in incorporating special circuitry in television receivers for a technology that is not used by cable systems.

2. In the *Report and Order* in this proceeding, the Commission adopted regulations implementing the provisions of the Television Decoder Circuitry Act of 1990 (Decoder Act).[1] These regulations, which are set forth in Section 15.119 of the Commission's rules, specify requirements for display of closed-captions on television receivers.[2] In particular, Section 15.119 requires that all television broadcast receivers with screen sizes equal to, or greater, 33 cm (13 inches) that were manufactured or imported on or after July 1, 1993 must be capable of receiving and displaying closed-captions. These rules also specify technical standards for the reception and display of such captioning. Subsequently, in the *Memorandum Order and Opinion* ("*MO&O*") in this proceeding, the Commission observed that existing closed-caption decoders may not function when the television signals is processed by some security systems designed to prevent unauthorized reception of cable service.[3] It therefore adopted an additional requirement, as set forth in Section 15.119(l) of the rules, that the closed-caption circuitry of television receivers must function properly when receiving signals from all commonly known and used cable security systems designed and marketed prior to April 5, 1991.[4]

3. Shortly prior to April 5, 1991, Eidak designed and marketed a copy protection system that was intended to prevent the video taping of certain programs carried by cable television systems or broadcast by television stations. The Eidak system dynamically changes the number of lines and the timing of the television picture. While these changes are not readily apparent to television viewers, video tape recorders, dependent on accurate and consistent timing, cannot copy Eidak-protected material. However, the Eidak system also interferes with the ability of existing closed-caption decoders to locate line 21 of the television broadcast signal, the line on which closed-caption information is carried. Thus, existing closed-caption decoders do not function properly when closed-caption information is processed by the Eidak system. For this reason, television receiver manufacturers would need to develop and incorporate in their products special circuitry that is only necessary for compatibility with Eidak-processed signals. Recognizing that the Eidak system was not widely used, the Commission provided television receiver manufacturers with additional time, until January 1, 1995, to incorporate Eidak compatibility within their closed-caption circuitry.[5]

4. On September 29, 1994, EIA submitted a *Petition for Rule Making* and a *Petition for Partial Waiver* requesting relief from Section 15.119(l) as it applies to Eidak's copy protection system.[6] In these petitions, EIA states that no cable systems are using the Eidak technology. EIA further states that Eidak's copy protection system is a technology that has never been, is not now, and is not ever likely to be used by a cable system. EIA asks that the Commission either amend or waive Section 15.119(l) with respect to the Eidak systems to relieve manufacturers and purchasers of television receivers of the expense and burden that is no longer necessary. On October 13, 1994, the Commission issued a Public Notice requesting comments on the EIA petitions. All of the commenting parties support EIA's request for relief.[7]

5. Prior to receipt of the petitions from EIA, the Commission, on June 6, 1994, contacted the current holder of the rights to the Eidak technology, Mr. Richard Leghorn, to determine whether or not this technology was being employed by cable systems.[8] In response, we were informed

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[1] Television Decoder Circuitry Act of 1990, Pub. L. 101-431.

[2] *See* 47 CFR Section 15.119.

[3] *See Memorandum, Opinion and Order* in GEN Docket No. 91-1, 7 FCC Rcd 2279 (1992). The House report on the Decoder Act, H.R. Rep. No. 767, 101st Congress, 2d Session (1990), at 15, stated that the Commission should "establish technical requirements and provide both for closed captioning and allowing cable systems to continue to use existing security techniques." It goes on to state that scrambling technologies utilized by the cable industry and other industries should "not interfere with viewers' ability to receive closed captioned programming."

[4] *See* 47 CFR Section 15.119(l).

[5] *See MO&O, supra*, at para. 13. The delay until January 1, 1995, for closed-caption television receivers to be compatible with the Eidak systems was not placed in the regulations.

[6] We are addressing both of these petitions in this Order. It does not appear that a waiver of the regulations or changes to the regulations are necessary. Rather, we find it appropriate to provide the relief requested by EIA through an Order granting partial relief of the regulations.

[7] Comments were filed by EEG Enterprises, Inc, EIA, Home Box Office, Nielsen Media Research, and Thomson Consumer Electronics, Inc.

[8] *See* letter of June 6, 1994, from Richard Engelman, Chief, Technical Standards Branch, to Richard Leghorn of Leghorn Telepublishing.

by Mr. Leghorn that "there are no cable systems using the Eidak technology."[9] Mr. Leghorn indicated that the Eidak copy protection capability currently is incorporated in a cable satellite network with equipment in cable head-ends and in "a pay-per-view Colorado test site jointly operated by TCI, AT&T and U.S. West."[10] He added that "it would be unfortunate if the option which the industry has to avail [itself] of Eidak's copy protection capabilities were to be removed by deletion of the requirements of Section 15.119(l) of the Commission's Rules."

6. We generally agree with Mr. Leghorn that maintaining regulations that require closed-caption reception to be compatible with copy protection systems is beneficial to consumers. However, we note that the Eidak system had not been implemented or used as an actual cable security system prior to April 5, 1991. Now, four years after the implementation of the closed-caption decoding requirements, the Eidak system has still not been widely implemented by cable systems or other industries. In view of the fact that the Eidak system has not achieved any significant acceptance by the cable industry, we now find that it is not necessary to require that the closed-caption circuitry of TV receivers be capable of functioning when receiving signals encoded with the Eidak technology.

7. Accordingly, IT IS ORDERED, that the provisions of Section 15.119(l) of the regulations for providing closed-caption compatibility do not apply to the Eidak system. This action provides the relief sought in the *Petition for Partial Waiver* and the *Petition for Rule Making* filed by the Electronic Industries Association. The authority for this action is contained in Sections 4(i), 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C Sections 154(i), 302, 303(r). In accordance with 5 USC 553(b), a Notice of Proposed Rule Making is unnecessary since this action is an interpretation of the existing regulations.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[9] *See* letter of June 29, 1994, from Richard S. Leghorn to Richard Engelman.

[10] *Id.* The Eidak copy protection is not used by the cable systems that receive programming from the satellite network. *See* EIA *Petition for Partial Waiver* at 4.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-259

In the Matter of

Amendment of Section 73.202(b),	RM-8341
Table of Allotments,	RM-8421
FM Broadcast Stations.	
(Earle, Pocohantas, and Wilson, Arkansas, and Como and New Albany, Mississippi)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 28, 1995; Released: August 3, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rulemaking filed on behalf of Earle Broadcasting, requesting the allotment of FM Channel 234C3 to Earle, Arkansas, as that community's first local aural transmission service.[2] Earle Broadcasting has stated that it will apply for a permit to construct an FM station on the newly allotted channel, should its petition be granted. The Commission released a *Notice of Proposed Rulemaking*, 8 FCC Rcd 7093 (1993), in response to Earle Broadcasting's petition, to which Broadcasters & Publishers, Inc. (BPI) submitted a counterproposal. Its counterproposal has two alternative options, as discussed in detail below.[3]

2. *Comments.* BPI, licensee of station WWKZ(FM), Channel 278C, New Albany, Mississippi, petitions the Commission to reallot the channel to Como, Mississippi, as that community's first local aural transmission service, and to modify its community of license accordingly, pursuant to the provisions of Section 1.420(i) of the Commission's Rules. If its petition is granted, BPI states that it will file an application to make minor changes in the station's facilities and to change the station's community of license. To accommodate this proposal, BPI requests the Commission to substitute Channel 234A for Channel 279A at Wilson, Arkansas, a proposal that is mutually exclusive with Earle Broadcasting's proposal.[4] The former permittee of the Wilson channel, Pollack Broadcasting Company (Pollack), has pending a petition for reconsideration of the cancellation of its construction permit.[5] However, it states that, should the Commission grant its petition for reconsideration, it will consent to the channel substitution proposed by BPI and will seek to modify its construction permit to effect the required site and frequency changes.

3. Under the first of BPI's two alternative proposals, no further modifications to the FM Table of Allotments are requested. Thus, BPI acknowledges that Earle would be prevented from acquiring its first local aural transmission service. However, it puts forth a second alternative that would further amend the FM Table of Allotments, should the Commission determine that the public interest would be better served by providing Earle with an FM channel. Under this second alternative, BPI proposes the allotment of Channel 280C3 to Earle, instead of Channel 234C3. To accommodate this modification of Earle Broadcasting's proposal, BPI requests the Commission to substitute Channel 281A for Channel 280A at Pocohantas, Arkansas, and to modify the license for station KPOC-FM accordingly. Without a subsequent change in transmitter site, station KPOC-FM would no longer meet the Commission's separation requirements. However, the licensee of the Pocohantas station, Scott Media Services (Scott), has consented to the proposed channel substitution and site change, and BPI has agreed to reimburse Scott's reasonable and documented expenses it may incur in effecting the changes.[6]

4. BPI notes that Como is an incorporated community with a mayor, a board of aldermen, and a 1990 Census population of 1,378 people. It adds that Como provides police, fire, water, and sewer services to its residents and businesses and that it has a post office and city library.

5. *Discussion.* We agree with BPI that Channel 280C3 is available for allotment to Earle, Arkansas in lieu of our previously proposed Channel 234C3, and that the allotment of Channel 280C3 would make it possible to provide new service to both Earle and Como, as requested by both petitioners. Consequently, we will allot Channel 280C3 to Earle as that community's first local transmission service. To accommodate this allotment, we will substitute Channel 281A for Channel 280A at Pocohantas, Arkansas, at reference coordinates 36°18'02" North, 90°53'55" West, and we will modify Station KPOC-FM's license accordingly. We can make these changes without issuing an Order to Show Cause why the changes should not be made because the licensee has consented to changes in both its frequency and transmitter site.

6. We now address the merits of BPI's counterproposal to reallot Channel 278C from New Albany to Como, Mississippi, and to modify the license for station WWKZ(FM) accordingly. Under the Commission's change of community *Report and Order* and *MO&O*,[7] we must compare BPI's proposal with the existing arrangement of allotments under our FM allotment priorities to determine which would constitute a "preferential arrangement of allotments."[8] The new facility at Como would provide that community with

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[1] The communities of Pocohantas and Wilson, Arkansas, and Como and New Albany, Mississippi, have been added to the caption.

[2] The 1990 U.S. Census records Earle as an incorporated community with a population of 3,393 people.

[3] The Commission sought comment on BPI's counterproposal in *Public Notice* 41498, January 28, 1994.

[4] While Earle Broadcasting has submitted comments in support of its own proposal, it has not addressed BPI's mutually exclusive proposal.

[5] Before being deleted, the station's call sign was KOSE-FM.

[6] BPI asserts that the population served by the Pocohantas station would increase from 13,195 to 17,639 people if its facilities were so changed.

[7] *Report and Order* in MM Docket No. 88-526, 4 FCC Rcd 4870 (1989), *recon. granted in part and denied in part*, 5 FCC Rcd 7094 (1990).

[8] The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).

its first local service, thereby implicating the third priority. We recognize, however, that the reallotment would result in a loss area of 46,606 people who would no longer receive the New Albany station. However, our concerns about this loss area would be mitigated by the fact that 85% of the population (39,818 people) in the loss area would remain served by at least five full-time aural reception services. Further, no area would be served by fewer than three such services, and New Albany itself would retain two local transmission services.[9] New Albany would also remain within the station's city-grade contour. The gain area (for the Como facility) would incorporate 671,624 people, 26,668 of whom currently are served by four or fewer full-time reception services.

7. In contrast, retaining the existing arrangement of allotments would not trigger priority number three, but instead would implicate lower allotment priority four: other public interest factors. Specifically, New Albany would have its third local aural service, a disruption in service would be avoided, and no underserved area would become more underserved. Because BPI's proposal triggers a higher allotment priority than does the existing arrangement, the proposal should be favored. Specifically, allotting the first local service to Como, a community of 1,378 people, is more important than retaining a third local service at New Albany, a community of 6,775 people.

8. We have determined that Channel 280C3 can be allotted to Earle at reference coordinates 35°15'20" North, 90°38'52" West. Channel 234A can be substituted for Channel 279A at Wilson at reference coordinates 35°29'46" North, 90°10'04" West, and Channel 278C can be reallotted from New Albany to Como at reference coordinates 34°32'56" North, 89°17'04" West, all in compliance with the Commission's minimum distance requirements. Further, as noted above, Scott has consented to the changes in its existing authorization that are necessary to effect BPI's proposal. Accordingly, in accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall modify the license for station WWKZ(FM) to specify operation on Channel 278C at Como, Mississippi, in lieu of its present use at New Albany, Mississippi.

9. *Conclusion.* Pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED that, effective **September 18, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Earle, Arkansas	280C3
Pocohantas, Arkansas	281A
Wilson, Arkansas	234A
Como, Mississippi	278C
New Albany, Mississippi	294C2

10. The window period for filing applications for Channel 280C3 at Earle, Arkansas, will open on **September 18, 1995** and close on **October 19, 1995**.

11. IT IS FURTHER ORDERED that pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of station WWKZ (FM) IS MODIFIED to specify operation on Channel 278C, Como, Mississippi, in lieu of New Albany, Mississippi, subject to the following conditions:

(a) Within 90 days of the effective date of this *Report and Order*, the licensee shall submit to the Commission a minor change application requesting the changes in transmitter site and community of license, as specified above;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed as authorizing any change in station WWKZ's license except those of the transmitter site and community of license, as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

12. IT IS FURTHER ORDERED that pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Scott Media Services for station KPOC-FM, Pocohantas, Arkansas, IS MODIFIED to specify operation on Channel 281A in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Report and Order*, the licensee shall submit to the Commission a minor change application requesting the changes in transmitter site and community of license, as specified above; and

(b) Nothing contained herein shall be construed as authorizing any change in station KPOC-FM's license except the channel and transmitter site, as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301); and

(c) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

13. IT IS FURTHER ORDERED that, if the construction permit of Pollack Broadcasting Company for station KOSE-FM, Wilson, Arkansas, is reinstated, it shall specify operation on Channel 234A.

14. Pursuant to Sections 1.1104(1)(k) and (2)(k) of the Commission Rules, any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rulemaking fee when filing its application to implement the change in community of

[9] WWZD-FM and WNAU.

license and/or upgrade. As a result of this proceeding, Broadcasters & Publishers, Inc., licensee of station WWKZ(FM), New Albany, Mississippi, is required to submit a rulemaking fee in addition to the fee required for the application to effectuate the license modification.

15. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

16. For further information concerning the above, contact Paul R. Gordon, Mass Media Bureau, (202) 776-1653.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 10, 1995

Released: April 12, 1995

IN REPLY REFER TO:
DA 95-777

Paul Glist, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W., #200
Washington, D.C. 20006-3456

Dear Mr. Glist:

This letter is in reference to the motion to dismiss filed on March 21, 1994 by Mark Twain Cablevision, Inc. ("Mark Twain"), with respect to a complaint filed March 7, 1994, against the price Mark Twain was charging for cable programming service in Plainview, Minnesota. CUID No. MN0579. In that motion, you state that Mark Twain is not required to justify its rates prior to May 15, 1994, because Mark Twain's Plainview, Minnesota system has less than 1,000 subscribers. Based on the information you have provided, it appears that the Plainview system qualifies as a "small system" pursuant to 47 C.F.R. § 76.901(c), and was therefore exempt from rate regulation until May 15, 1994.

We will rule at a later date on Mark Twain's justification under the Commission's revised rate regulations of its cable programming service rates in Plainview beginning May 15, 1994.

Should you have any questions regarding this matter, please contact Peter G. Wolfe at (202) 739-0783.

Sincerely,

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

cc: City of Plainview
Steven L. Erwin

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Horry Telephone Cooperative, Inc. — CUID No. SC0272 (Loris)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1995; Released: April 12, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only the rate for basic service, not for CPS. In particular, the record shows that at the time of this complaint Operator offered only a basic tier of service, and not a CPS tier, in this community.[2] The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

[2] Operator has announced a new channel line-up, including a new Cable Plus tier, but the letter announcing the new channel line-up made clear that it would only become effective as its fiber upgrade is completed. Operator states that the upgrade for Loris was not expected to be completed until January 1995 at the earliest. Motion to Dismiss at 2 (Mar. 17, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. — CUID No. PA1642, Blandon

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1995; Released: April 12, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in Blandon, Pennsylvania. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint was received by the Commission on October 12, 1993. Operator filed FCC Form 393 in response.

5. In its benchmark filing, Operator calculated a maximum permitted CPS rate of $7.45 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Operator's actual monthly charge for its CPS tier was $7.48 (plus franchise fee). Thus, Operator has failed to show that its rate for the CPS tier was not unreasonable.

6. Upon review of the record herein, we conclude that Operator has failed to justify the rate it was charging during the period from October 12, 1993 to May 14, 1994.[11] However, we further determine that the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Operator in Blandon, Pennsylvania IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Blandon, Pennsylvania, for the period beginning

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $7.45 (plus franchise fee).[12]

9. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[12] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Eastern Connecticut Cable Television, Inc.	CUID Nos. CT0017, New London; CT0018, East Lyme; CT0019, Montville; CT0020, Waterford; CT0052, Putnam; CT0053,
Benchmark Filing to Support Cable Programming Service Price	Killingly; CT0054, Plainfield; CT0084, Griswold; CT0174, Sterling

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1995; Released: April 12, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Eastern Connecticut Cable Television, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. — CUID No. TN0036, Newport

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1995; **Released: April 12, 1995**

By the Chief, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in Newport, Tennessee. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint was received by the Commission on January 10, 1994. Operator filed FCC Form 393 in response; Operator also filed an amended Form 393 filing on June 24, 1994 and a supplemental filing on February 6, 1995.[11] On March 8, 1995, Operator responded to a Commission letter which requested further clarification of Operator's showing.[12]

5. In its supplemental filing of February 6, 1995, Operator calculated a maximum permitted rate for the CPS tier of $7.95 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Operator's actual monthly charge for its CPS tier was $8.37 (plus franchise fee). Thus, Operator has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

6. Upon review of the record herein, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $7.95 per month (plus franchise fee) for the period from January 10, 1994 to May 14, 1994.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed an amended FCC Form 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

[12] Letter from Julia Buchanan, FCC, to Cody Colquitt, Sammons Communications, Inc. (February 24, 1995).

[13] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Operator in Newport, Tennessee IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in Newport, Tennessee that portion of the amount paid for cable programming service for the period from January 10, 1994[14] to May 14, 1994 which exceeded $7.95 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Newport, Tennessee, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $7.95 (plus franchise fee).[15]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

12. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS price in Newport, Tennessee for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Warner Cable of Williamsburg CUID No. VA0074
Williamsburg, Virginia

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 6, 1995; Released: April 14, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider a complaint about the price Warner Cable of Williamsburg ("Warner Cable") was charging for its cableIn the matter of) programming service ("CPS") tier in Williamsburg, Virginia, CUID No. VA0074. Warner Cable has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Warner Cable's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served by the City of Williamsburg, Virginia, on Warner Cable on September 30, 1993. The Commission received the complaint on October 4, 1993.

5. Warner Cable attempted to justify its CPS price through an FCC Form 393 filed on November 15, 1993. Warner Cable refiled its justification on the prescribed form on May 23, 1994 in response to a Cable Services Bureau Order citing common deficiences observed in benchmark filings generally.[11]

DISCUSSION

6. Warner Cable claims that its monthly CPS tier price of $12.57 per subscriber is justified by its benchmark filing, which shows a maximum permitted charge of $12.58. However, upon review we have determined that Warner Cable has not correctly calculated its maximum permitted price, and it is appropriate to make the following adjustments to Warner Cable's calculations in the Form 393:

a. Warner Cable's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Instead of entering its current monthly equipment revenue, Warner Cable entered a figure based on its prior equipment rates. This observation is confirmed by the fact that Warner's Worksheet 2, Line 204 entry is the same as its Worksheet 1, Line 104 entry. As a result, Warner Cable's Line 104 entry must be revised to reflect its current monthly equipment revenue. Since Warner Cable restructured its rates, including its equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regula-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Warner Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Warner Cable implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Warner Cable's price for the period after May 14, 1994 may be required to reflect the fact that Warner Cable's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

tions, the monthly equipment cost figure it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 entry.[12] Accordingly, on Line 104 we enter $1,840.00 instead of $8,870.00.

b. In its Form 393 filing, Warner Cable calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of October 1993. However, the figures Warner Cable used are not consistent with data on which it should have relied in calculating the Inflation Adjustment Factor. Warner Cable used the Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on August 31, 1993 to complete Lines 122 and 125, but used an outdated GNP-PI of 121.8 for the third quarter of 1992 in calculating Line 123. The GNP-PI figure for the third quarter of 1992 released on August 31, 1993 was 122.5. Warner Cable's calculation of the Inflation Adjustment Factor is thus incorrect.

c. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which Warner Cable filed.[13] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Warner Cable used in justifying its rates.

7. Because of these errors, we conclude that Warner Cable has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly price for the CPS tier from $12.58 (as Warner Cable calculated) to $12.18.

CONCLUSIONS

8. Upon review of the record herein, we conclude that Warner Cable's showing supports a maximum reasonable CPS tier price of $12.18 per month (plus franchise fee) for the period of October 4, 1993 to May 14, 1994 for CUID No. VA0074.[14] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Warner Cable must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Warner Cable's prices during the earlier period was unreasonable.[15] We reserve the right to make further adjustments to Warner Cable's price for the period after May 14, 1994, upon completion of our review of Warner Cable's FCC Form 1200 rate filing.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 4, 1993 complaint against the cable programming service price charged by Warner Cable of Williamsburg in Williamsburg, Virginia, CUID No. VA0074, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Warner Cable of Williamsburg with respect to Williamsburg,Virginia, CUID No. VA0074, for the period of October 4, 1993 to May 14, 1994, justifies a maximum price of $12.18 per month (plus franchise fee) for Warner Cable's cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Warner Cable of Williamsburg shall refund to subscribers that portion of the amounts paid for cable programming service from October 4, 1993[16] to May 14, 1994 in Williamsburg, Virginia, CUID No. VA0074, that exceeded $12.18 per month (plus franchise fee), and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Warner Cable of Williamsburg shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Warner Cable of Williamsburg shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Williamsburg, Virginia, CUID No. VA0074 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for those franchise areas (plus franchise fee).

15. IT IS FURTHER ORDERED that Warner Cable of Williamsburg shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above,

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[12] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[13] *See* 47 C.F.R. §76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of Warner Cable listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reviewed Warner Cable's Form 1200 rate filing and confirmed that Warner Cable's calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

a CPS tier price for Williamsburg, Virginia, CUID No. VA0074, that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Kansas City Cable Partners dba American Cablevision Lee's Summit, Missouri — CUID N0. MO0072

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1995; Released: April 14, 1995

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Kansas City Cable Partners dba American Cablevision ("Cablevision") was charging for its cable programming service ("CPS") tier in Lee's Summit, Missouri, CUID No. MO0072. Cablevision has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Cablevision's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on Cablevision on October 9, 1993. The Commission received the complaint on October 15, 1993.

5. Cablevision attempted to justify its CPS price through an FCC Form 393 filed on November 12, 1993.

DISCUSSION

6. Cablevision claims that its monthly CPS tier price of $13.09 per subscriber is justified by its benchmark filing, which shows a maximum permitted charge of $13.10. However, upon review we have determined that Cablevision has not correctly calculated its maximum permitted price, and it is appropriate to make the following adjustments to Cablevision's calculations in the Form 393:

a. In reporting its capital costs of leased customer equipment on Part III, Schedule C, Cablevision overdepreciated its set top converters and remotes, exceeding the gross book value of each asset. This is in violation of Generally Accepted Accounting Principles. The remaining book value of each asset prior to applying the annual depreciation expense was less than the annual depreciation expense claimed by Cablevision. Therefore, we reduced the depreciation expense for each asset to equal the remaining book value.

b. On its Form 393 filing, Cablevision calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of November 1993. However,

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cablevision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cablevision implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Cablevision's price for the period after May 14, 1994 may be required to reflect the fact that Cablevision's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 9 FCC Rcd 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 9 FCC Rcd 4189 n.195.

Cablevision cannot permissibly calculate inflation through the end of November 1993.[11] Based on the service date of the earliest valid complaint, Cablevision was required to file a rate justification no later than November 15, 1993. Since Cablevision filed its initial FCC Form 393 by that date, the instructions to Form 393 required it to calculate the inflation adjustment only through October 1993.[12] We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Cablevision timely filed its Form 393.[13] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Cablevision should have used in justifying its rates.

7. Because of these errors, we conclude that Cablevision has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly price for the CPS tier from $13.10 (as Cablevision calculated) to $13.08.[14]

CONCLUSIONS

8. Upon review of the record herein, we conclude that Cablevision's showing supports a maximum reasonable CPS tier price of $13.08 per month (plus franchise fee) for the period October 15, 1993 to May 14, 1994.[15] However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

9. We further conclude that Cablevision must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that Cablevision's price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to Cablevision's price for the period after May 14, 1994 upon completion of our review of Cablevision's FCC Form 1200 rate filing.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 9, 1993 complaint against the cable programming service price charged by Kansas City Cable Partners dba American Cablevision, in Lee's Summit, Missouri, CUID No. MO0072, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Kansas City Cable Partners dba American Cablevision with respect to Lee's Summit, Missouri, CUID No. MO0072, for the period of October 15, 1993 to May 14, 1994, justifies a maximum price of $13.08 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(c) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(c), that American Cablevision shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Lee's Summit, Missouri, CUID No. MO0072, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED that American Cablevision shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[11] Furthermore, even if November 1993 were a permissible base date, Cablevision incorrectly calculated the Inflation Adjustment Factor using data from inconsistent U.S. Department of Commerce releases.

[12] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in acordance with the most accurate data available at the time of analysis.)

[14] These adjustments have the effect of causing Cablevision to calculate its permitted rates from Form 393, Part II, Worksheet 2 rather than Worksheet 1. However, Cablevision has not completed Worksheet 2 of Form 393. Therefore, we have completed worksheet 2 by using data supplied by Cablevision in its Form 1200 filing.

[15] This finding is based solely on the representations of Cablevision listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We reviewed Cablevision's FCC Form 1200 rate filing and confirmed that Cablevision calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MetroVision, Inc. CUID No. MI0640 (Farmington, MI)
MI0641 (Farmington Hills, MI)
MI0642 (Novi, MI)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1995; Released: April 13, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price that MetroVision, Inc. ("MetroVision") was charging for its cable programming service ("CPS") tier in the communities designated above. MetroVision has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of MetroVision's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on MetroVision and received by the Commission on the dates set forth on Appendix A. MetroVision filed FCC Form 393 in response: MetroVision has also filed amended and supplemental Form 393 filings, most recently on June 23, 1994.[11]

5. MetroVision's initial benchmark filing on November 23, 1993 asserted that its monthly CPS tier price of $11.11 was justified by its benchmark filing because its price was equal to the maximum permitted charge as calculated in the filing. However, after a review and determination by the local franchising authority that MetroVision's charges for the basic service tier and for certain equipment items were unreasonable, MetroVision restructured both its Basic tier and CPS tier prices. In its amended Form 393 filing on June 23, 1994, MetroVision included evidence showing that effective April 1, 1994, MetroVision reduced its monthly CPS tier price from $11.11 to $10.93. The evidence also shows that MetroVision has issued a refund credit to reimburse subscribers for the amount they paid in excess of a reasonable price for Basic and CPS tier services.

6. Upon review of the record herein, we conclude that MetroVision's showing justifies the maximum reasonable CPS tier price of $10.93 (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[12]

7. We further conclude that no further action is warranted regarding the complaints addressed in this Order for the period ending May 14, 1994 because MetroVision has

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent MetroVision has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in MetroVision's price for the period after May 14, 1994 may be required to reflect the fact that MetroVision's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, MetroVision filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] This finding is based solely on the representations of MetroVision. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

already restructured its rates in accordance with the maximum permitted price determined in this Order and has already reimbursed its subscribers for the amount they paid in excess of a reasonable price for the CPS tier for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to April 1, 1994.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in this Order against the cable programming service price charged by MetroVision in the areas referenced in the caption herein, and all other complaints in these franchise areas related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
MI0640	10/14/93	10/01/93
MI0641	10/28/93	10/25/93
MI0642	10/28/93	10/25/93

Appendix B

CUID No.	Actual Rate (as of lst valid complaint)	Actual Rate (as of 4/1/94)	Maximum Permitted Rate
MI0640	$11.11	$10.93	$10.93
MI0641	$11.11	$10.93	$10.93
MI0642	$11.11	$10.93	$10.93

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Inland Bay Cable TV Associates — CUID No. MA0128, Attleboro

Withdrawal of FCC Form 329
Rate Complaint

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1995; Released: April 13, 1995

By the Deputy Chief, Cable Services Bureau:

1. On April 1, 1994, the City of Attleboro, Massachusetts (the "City") filed a complaint alleging that the price charged by Inland Bay Cable TV Associates ("Inland Bay") for its cable programming service ("CPS") tier in Attleboro was unreasonably high.[1] On February 6, 1995, the City withdrew its complaint, stating that it was satisfied that Inland Bay's rates are fair and reasonable. The City was the only complainant who filed a complaint with this Commission against the CPS price in Attleboro. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. We will allow the withdrawal of this complaint, and our review of this case will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a validcomplaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7]

4. This Commission has now received a letter from the City stating that it wishes to withdraw its CPS rate complaint against Inland Bay. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[8] While our rules forbid collusive agreements between operators and local franchising authorities regarding forebearance from rate regulation, there is no evidence of such an agreement here. We will accordingly allow the City to withdraw its complaint. Because our review of the rate justification showing is predicated on the existence of a rate complaint, and because Inland Bay no longer faces such a complaint, we are terminating our review for this community.

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that permission to withdraw the FCC Form 329 rate complaint against the cable programming service rate of Inland Bay Cable TV Associates in Attleboro, Massachusetts, CUID No. MA0128, IS GRANTED and our review of this case IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[1] The complaint was initially filed on February 25, 1994, but it was returned by the Commission on March 16, 1994 pursuant to 47 C.F.R. § 76.954. The complainant timely filed a corrected complaint on April 1, 1994. *See* 47 C.F.R. § 76.955.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Second Order on Reconsideration*); 47 C.F.R. § 76.922(b).

[7] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[8] Conference Report on the Cable Act of 1992, at 62. *See also*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) (*Rate Order*) at 5669.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Douglas Cablevision CUID No. TX0423 (Mason)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1995; Released: April 13, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Maclean Hunter Cable TV, Inc. — CUID No. MI0411 (Allen Park)

Benchmark Filing to Justify Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1995; Released: April 13, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Maclean Hunter Cable TV, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b)

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b)

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Grassroots Cable Systems, Inc. CUID No. NH0174
Sugar Hill, New Hampshire

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1995; Released: April 13, 1995

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider a complaint about the price Grassroots Cable Systems, Inc. ("Grassroots") was charging for cable programming service ("CPS") in Sugar Hill, New Hampshire, CUID No. NH0174.

2. The only complaint against Grassroots's CPS rate in Sugar Hill, New Hampshire, CUID No. NH0174, was filed on March 6, 1994, and states that it was filed to object to a rate increase for the CPS tier offered by Grassroots. Under the Commission's rules, a complaint regarding a rate change for the CPS tier may be filed within 45 days from the date the complainant first receives a bill reflecting the rate change.[1] However, according to the complaint, the complainant first received a bill reflecting the rate change on November 24, 1993. Therefore, the filing of the complaint on March 6, 1994 was not timely and the complaint must be dismissed.

3. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint filed March 6, 1994 against the cable programming service charge of Grassroots Cable Systems, Inc. in Sugar Hill, New Hampshire, CUID No. NH0174 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Bureau Chief,
Cable Services Bureau

[1] 47 C.F.R. § 76.953(b). Complaints about rates in effect on September 1, 1993 must be filed by February 28, 1994. 47 C.F.R. § 76.953(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-295

In the Matter of

Amendment of Section 73.202(b), RM-8362
Table of Allotments,
FM Broadcast Stations.
(San Clemente, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1995; Released: August 4, 1995

By the Chief, Allocations Branch:

1. We consider herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 8511 (1993), issued at the directive of the Commission (*see* 8 FCC Rcd 3123 (1993)), proposing the deletion of Channel 285A, San Clemente, California, from the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. The Commission's directive was based upon the evidence and findings presented in the context of the comparative proceeding in MM Docket No. 89-503, upholding an earlier denial of the competing applications for Channel 285A at San Clemente. Wilson FM Broadcasters, Inc. ("Mt. Wilson"), licensee of Station KKGO(FM), Channel 286B, Los Angeles, California, filed supporting comments in response to the *Notice*. Late filed comments were filed by Steven R. Bartholomew ("Bartholomew"), to which Mt. Wilson responded.[1] Additional comments were filed by Mt. Wilson and Bartholomew.[2]

2. Channel 285A was allotted to San Clemente in 1985. *See San Clemente, California*, 50 FR 8226, published March 1, 1985, *recon. denied*, Mimeo No. 6821, August 13, 1986, *review denied*, 2 FCC Rcd 2514 (1987), *recon. denied*, 3 FCC Rcd 6728 (1988), *appeal dismissed sub nom. Mount Wilson FM Broadcasters, Inc. v. F.C.C.*, 884 F.2d 1462 (D.C. Cir. 1989). The history surrounding the allotment of Channel 285A to San Clemente, as well as the resultant comparative application proceeding, was set forth extensively in the *Notice* and need not be fully repeated here. However, in order to place this proceeding in perspective, a summary of the events leading to the instant mandate to delete Channel 285A at San Clemente is appropriate. Due to spacing constraints to area stations, the only transmitter site location to accommodate Channel 285A in conformity with the minimum distance separation requirements of Section 73.207 of the Commission's Rules was located within the confines of the Camp Pendleton Marine Corps compound. Based upon the reasonable possibility that a site may be made available for broadcast use on Camp Pendleton, as represented by a military official, Channel 285A was allotted to San Clemente. However, at the application level, the U.S. Marine Corps arduously opposed the applicants' proposed sites on Camp Pendleton, stating that the construction of a commercial broadcast tower on military property to accommodate Channel 285A would not be approved. Thus, most of the applicants requested a waiver of Section 73.207 of the Commission's Rules. The Commission upheld the allotment on review, stating that because Channel 285A was correctly allotted to San Clemente based upon an accurate decision that was reasonable then, it would have been inequitable to rescind the allotment without considering the applicants' specified short-spaced sites beyond the boundaries of Camp Pendleton and their associated waiver requests. *See San Clemente, California*, 3 FCC Rcd 6728, 6729 (1988).

3. As a result of a comparative hearing, all of the applications were denied for failure to demonstrate that the public interest would be served by a waiver of their proposed short spacing deficiencies. *See On the Beach Broadcasting*, 6 FCC Rcd 5221 (1991). The Review Board upheld the conclusion that waiver of Section 73.207 of the Commission's Rules would not serve the public interest. *See* 7 FCC Rcd 1346 (1992). The Commission reaffirmed the decisions below that the applicants had failed to demonstrate any compelling public interest benefits to overcome critical interference considerations,[3] particularly since San Clemente has local transmission service and receives over thirty reception services. *On the Beach Broadcasting*, 8 FCC Rcd 3123 at 3127 (1993).

4. In the absence of the availability of an alternate transmitter location to accommodate Channel 285A at San Clemente consistent with the Commission's technical allotment requirements, the Commission's directive was issued to initiate this proceeding looking toward its deletion from the FM Table of Allotments. *See* 8 FCC Rcd 3123 (1993).

5. In supporting comments, Mt. Wilson advises that over the past thirty years, it has continually opposed consideration of Channel 285A at San Clemente, as well as its

[1] Bartholomew's late-filed comments were not accompanied by a motion to accept. However, they have been reviewed as a discretionary matter to determine if, on the basis of the information contained therein, they are responsive to the directives set forth in the *Notice*. Our review reveals that they are not. Therefore, even if Bartholomew's comments had been timely filed, they would not have altered our order to delete Channel 285A at San Clemente in the absence of evidence that military policy against allowing a commercial transmitter to be sited on Camp Pendleton has changed, or that a fully spaced location exists beyond the boundaries of Camp Pendleton to accommodate Channel 285A. Mere speculation as to the availability of a particular site is not responsive to the terms of the *Notice*.

[2] In view of the disposition of Bartholomew's comments, the additional responsive comments filed herein are moot and need not be discussed.

[3] Specifically, the record in MM Docket No. 89-503 established that due to the spacing deficiency attached to Channel 285A, interference would be created by Station KKGO(FM) to 42,147 persons, representing 26.4% of the population to be served by the proposed short-spaced San Clemente station. Additionally, operation on Channel 285A from the applicants' specified site would cause interference to 330,551 persons, representing 3.4% of the population within the protected contour of Station KKGO(FM). The degree of interference was found to be unacceptable and the applications were denied.

subsequent allotment.[4] Mt. Wilson advises that Station KKGO(FM), Channel 286B, is a super-powered, grandfathered broadcast facility that operates from an extremely high antenna site on Mt. Wilson. As its *actual* operating power is 20 times greater than would be permissible for a new Class B FM station, the interfering contour of Station KKGO operating as licensed, not only encompasses the entirety of San Clemente but extends seven kilometers beyond the boundary of the city in a southerly direction. Consequently, Mt. Wilson remarks that not only would all of San Clemente receive objectionable interference, but Station KKGO(FM) would cause interference also to 76% of the total service area which might be served by a short-spaced San Clemente station. Moreover, Mt. Wilson notes that it has previously been determined that operation on Channel 285A at San Clemente could not provide the requisite contour protection to Station KKGO(FM), pursuant to the requirements of Section 73.215(b)(2)(ii) of the Commission's Rules, based upon a maximum effective radiated power of 50 kW for its Class B facility. *See* 8 FCC Rcd 3125 (paras. 8-10). Accordingly, as Channel 285A at San Clemente has been found to be a technically inferior allotment, Mt. Wilson urges its deletion from the FM Table of Allotments.

6. In consideration of the above, we find that the retention of Channel 285A at San Clemente no longer serves the public interest since it may never be properly utilized, and therefore, it will be rescinded. *See Pinckneyville, Illinois*, 41 RR 2d 69 (1977). While we are reluctant to remove an opportunity for the residents of San Clemente to receive an additional local broadcast service, the deficiencies associated with Channel 285A are too immense to warrant retaining the channel in the FM Table of Allotments. Our determination is based upon the absence of a demonstration by any interested party of the existence of a fully spaced site beyond the boundaries of Camp Pendleton to accommodate Channel 285A at San Clemente consistent with the Commission's technical allotment requirements.[5] Moreover, our finding is buttressed by the evidence adduced during the protracted history of this proceeding which unequivocally demonstrated the unavailability of any transmitter sites outside the confines of the military compound to accommodate the applicants in conformity with the minimum distance separation requirements of Section 73.207 of the Commission's Rules, as well as their failure to establish sufficiently compelling public interest benefits to justify waivers thereof. *See On the Beach, supra.* Moreover, as the record below established, the severe interference considerations attached to Channel 285A far outweigh the benefits of retaining the allotment at San Clemente.[6]

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 18, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to San Clemente, California, as follows:

City	Channel No.
San Clemente, California	300B

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[4] As stated in the *Notice*, in 1965 the Commission considered a request to allot FM Channel 285A to San Clemente. Even then, it was determined that spacing constraints would have confined a transmitter site for Channel 285A to Camp Pendleton. In recognition that a site on military property would not be made available for commercial broadcast use, the reallotment of Channel 300 from Lancaster to San Clemente was requested to provide that community with FM broadcast service. Since Channel 285A could not be utilized from a fully-spaced site on non-military property, the request was dismissed and Channel 300 was allotted to San Clemente, as requested. *See* 2 FCC 2d 647 (1966).

[5] While Bartholomew contends that Southern California Edison ("SCE") has a 60-year lease on 83 acres of Camp Pendleton and that SCE has verbally indicated that it may be willing to lease tower space, no evidence was presented to document these allegations or to show that a commitment was made. *See supra*, note 1.

[6] San Clemente will retain local radio service. Additionally, it is served by a multiplicity of reception services. *See* 8 FCC Rcd at 3127.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-245

In the Matter of

Amendment of Section 73.202(b), RM-8316
Table of Allotments,
FM Broadcast Stations.
(Hayneville, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1995; Released: August 4, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 7022 (1993), issued in response to a petition filed by R. J. Miller ("petitioner") proposing the allotment of FM Channel 300A to Hayneville, Alabama, as that community's first local aural transmission service. Petitioner filed comments requesting withdrawal of his proposal. Petitioner also filed a counterproposal,[1] followed by supplemental comments.[2] No other comments were received.

2. In initial comments, petitioner requested dismissal of his proposal to allot FM Channel 300A to Hayneville, Alabama, premised upon inherent technical deficiencies associated with the frequency.[3] Petitioner states that according to FAA consultants, the close proximity of Danley Field (the Montgomery, Alabama, municipal airport), would limit Channel 300A to an antenna height in any fully spaced site to no more that 74.6 meters. Petitioner claims that based upon the height limitation, the requirements of Section 73.315 of the Commission's Rules could not be accommodated on Channel 300A. Additionally, petitioner states that as Channel 300 is adjacent to the aeronautical radio band, electromagnetic interference would be created if that allotment were made to Hayneville.

3. In separate comments filed simultaneously with his withdrawal request, petitioner counterproposed, *inter alia*, the allotment of Channel 246A to Hayneville, Alabama.[4] However, since petitioner has requested dismissal of his proposal to allot FM Channel 300A to Hayneville, his counterproposal is not mutually exclusive with that proposal.[5] Moreover, as discussed in footnote 4, *supra*, technical infractions contained in petitioner's counterproposal preclude its acceptance in the context of a separate *Notice of Proposed Rule Making*.

4. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. In the absence of such an expression of interest, it is the Commission's policy to refrain from allotting a channel. As a result of the petitioner's withdrawal of interest and in the absence of any other acceptable expression, the request to allot Channel 300A to Hayneville, Alabama, will be dismissed. *See Vail, Colorado*, 9 FCC Rcd 7820 (1994); *Gillman, Illinois*, 6 FCC Rcd 2197 (1991), and the Appendix to the *Notice*.

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[1] Pursuant to the discussion in paragraph 2, *infra*, petitioner's counterproposal was not acceptable for consideration. Therefore, it was not placed on Public Notice.

[2] Petitioner's supplemental comments were not accompanied by a motion to accept. The Commission's Rules do not contemplate the acceptance of pleadings filed beyond the comment cycle unless specifically requested or authorized by the Commission. *See* Section 1.415(d) of the Commission's Rules. In this instance, neither criteria is applicable. However, we have reviewed the supplemental comments as a discretionary matter to determine if, on the basis of the information contained therein, petitioner's proposal could be accommodated without prejudicing any other pending request. We find that it cannot. Petitioner has requested dismissal of his counterproposal, and reinstatement of his original interest in the allotment of Channel 300A to Hayneville, based upon changed circumstances. In that regard, petitioner asserts that the FAA recently sanctioned the construction of a structure for cellular telephone use in an area beyond Danley Field. As a result petitioner asserts that Channel 300A can be accommodated in the vicinity of the cellular site, from which it appears there would also be no EMI interference concerns. Therefore, petitioner seeks a change in the reference coordinates for Channel 300A at Hayneville to specify a site at coordinates 32-15-09 and 86-29-20. However, we have determined that site to be 2 kilometers (1.24 miles) short spaced to the reference coordinates for Channel 299A, Georgiana, Alabama, at 31-39-31 and 86-44-22, and 16.4 kilometers (10.2 miles) short spaced to the pending one-step application of Station WWGA(FM), Georgiana, specifying Channel 299C2 at coordinates 31-27-08 and 86-37-07 (File No. BPH-950309IA), which is entitled to cut-off protection. *See Conflicts between Applications and Petitions for Rulemakings to Amend the FM Table of Allotments*, MM Docket No. 91-348, 7 FCC Rcd 4917 (1991). Therefore, petitioner's supplemental comments to reinstate his original rule making request cannot be considered.

[3] Pursuant to the requirements of Section 1.420(j) of the Commission's Rules, petitioner provided a statement that he has not been offered nor sought any monetary compensation in exchange for withdrawing his expression of interest in this proceeding.

[4] Petitioner also requested the substitution of Channel 226A for Channel 246A at Millbrook, Alabama, and modification of the license for Station WMCZ(FM), Channel 246A, Millbrook, as well as the substitution of Channel 300A for Channel 247A at Orrville, Alabama, and modification of the authorization for Station WJAM-FM, Channel 247A accordingly. Station WJAM-FM would be required to relocate its transmitter site, which it agreed to do. However, petitioner's engineering studies do not indicate for allotment purposes, that Station WJAM-FM could be accommodated on Channel 300A at Orrville consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. Moreover, we note that the ownership of Station WJAM-FM has changed and there is no indication from the new permittee that it is willing to effectuate the changes necessary to accommodate the petitioner's proposal. Therefore, petitioner's proposal is technically defective and cannot be considered.

[5] A counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made. *See, e.g., Implementation of BC Docket 89-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 (1990).

5. In consideration of the above, IT IS ORDERED, That the request of R. J. Miller (RM-8316), proposing the allotment of FM Channel 300A to Hayneville, Alabama, IS DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.606(b).
Table of Allotments.
Television Broadcast Stations.
(Bend, Oregon)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: July 24, 1995; Released: August 4, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed by 3-J Broadcasting Company ("petitioner").[1] Petitioner seeks reconsideration of the Commission's action returning as unacceptable its June 27, 1994, petition for rule making requesting the allotment of Channel 38 to Bend, Oregon, as the community's fourth local television service.

BACKGROUND

2. Petitioner recognized that Bend is located 194.1 kilometers from the Portland, Oregon, reference coordinates, and thus subject to the *Freeze Order* issued in connection with the Commission's rule making concerning advanced television technologies.[2] It argued, however, that a waiver of the freeze should be granted. According to petitioner, the waiver would be warranted because there would be no preclusive effect on possible Portland allotments because Channel 38 is already precluded by the existence of Portland Channels 24, 30 and 40. In addition, petitioner stated that 12 MHz adjacent channel pairs 58-59, 60-61, 65-66 and 68-69 are available for allocation to Portland. In returning the petition, we acknowledged that the *Freeze Order* does permit waiver requests to be considered on a case-by-case basis. However, these waiver requests are limited to noncommercial educational channels and to licensees which provide compelling reasons why the freeze should not apply to their particular situation or class of station. Finding that petitioner's request fell within neither of these exceptions, its petition was returned as unacceptable for consideration at that time.

PETITION FOR RECONSIDERATION

3. Petitioner states that the Commission erred in not accepting its petition based on the fact that it is not an existing licensee requesting a change in its facilities. In support, it points to a waiver granted by the Chief, Mass Media Bureau, to an applicant for a new television station in Roseburg, Oregon,[3] "even though the proposed channel allotment was subject to the Freeze Order." Petitioner contends that the *KMTR* decision demonstrates that waivers are not limited to licensees, as opposed to applicants, and thus the basis for returning its petition is "inconsistent with established precedent." Secondly, it states that the *KMTR* decision establishes that the proper focus of waiver requests is the extent to which the proposed use of the "to-be-allotted" channel will preclude use of that channel in the market protected by the *Freeze Order*. Petitioner states that the fact that Channel 38 at Bend would not preclude its use at Portland was not considered in rejecting its proposal. As further support that the allotment would not have any preclusive effect, petitioner states that Portland would be shielded by terrain from a Bend Channel 38 station because of the mountainous terrain between the two cities and the likelihood that the transmitter of the Bend station would be co-located with the transmitters of the other Bend stations.

DISCUSSION

4. We have considered petitioner's reconsideration request and find that it should be denied. In instituting the freeze on new channel allotments, the Commission recognized that many of the new television technologies under consideration in the Advanced Television Systems ("ATV") proceeding require different amounts "of spectrum and different transmission and reception methods."[4] Therefore, the *Freeze Order* is intended to assure flexibility in case additional bandwidth is to be allocated for use by such ATV systems. Petitioner has provided no instance where the Commission granted a waiver of the *Freeze Order* at the allotment stage. Rather, the *KMTR* waiver involved an application for an existing channel. In fact, the Commission proposed, and subsequently granted, the Roseburg allotment based upon a finding that the transmitter could be sited at least 11 miles south of Roseburg so as not to be affected by the freeze on applications for new stations in the Portland area and the petitioner's willingness to specify such a site. Further, the Roseburg *Report and Order* went on to state that any application which did not meet the 175 mile separation might not be accepted for filing if the Commission's freeze on such applications was still valid. *See Roseburg and Canyonville, Oregon*, 2 FCC Rcd 6999 (1987), 3 FCC Rcd 4311 (1988). Since Bend is located only 121.2 miles from Portland, no such site restriction could be imposed on the allotment so as to avoid a conflict with the *Freeze Order*.

5. We believe that the petitioner has also misconstrued the basis for the grant of the Roseburg applicant's waiver request. The waiver grant was not based on the fact that

[1] Public Notice of the filing of the reconsideration was given on August 24, 1994, Report No. 2027. *See* 59 FR 43838, August 25, 1994.

[2] *See*, Public Notice, *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 FR 28346, July 29, 1987.

[3] *See KMTR, Inc.*, Ref. 8940-MLB (March 5, 1990).

[4] *See Notice of Inquiry*, MM Docket No. 87-268, 2 FCC Rcd 5125 (1987).

use of Channel 36 was precluded from use at Portland because of the existence of other channels already allotted to Portland or nearby communities. Rather, the *KMTR* letter states that:

> The existence of other channels in or near a listed city that would preclude the construction of a new station there because of UHF taboos' would not be a bar to the use of the channel for advanced television. Consequently, the existence of Channels 22 and 40 in Portland and Channel 21 in Astoria would have no impact on the use of Channel 36 in Portland for ATV purposes. Further, it is unclear what you mean when you argue that Channels 58-61, 65 and 66 are available for ATV use, since none of those channels are currently vacant allocations in the Portland area. *In any event, Roseburg is located close enough to the edge of the 174.5 mile 'freeze' radius around Portland so that we do not believe operation on Channel 36 in Roseburg will preclude use of that Channel for ATV service in the Portland area. Consequently, we believe there is sufficient basis for grant of the waiver.* (Emphasis added)

The transmitter site specified by KMTR is 161.1 miles from Portland and thus a waiver at the application stage of 13.4 miles was involved. Bend, on the other hand, is located only 121.2 miles from Portland, thus requiring a waiver of at least 53.3 miles.

6. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by 3-J Broadcasting Company, IS DENIED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

	CUID Nos. NJ0083 (North Bergen)
Cablevision of Riverview, Inc.	NJ0111 (Hoboken)
	NJ0345 (Weehawken)
Benchmark Filing to Support	NJ0365 (West New York)
Cable Programming Service Price	NJ0366 (Union)

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 1995; Released: August 4, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were served on Operator and received by the Commission on the dates set forth on the Appendix. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings.[11]

5. On March 28, 1994, Operator filed a Motion to Dismiss the complaints filed in each of the franchise areas by the State of New Jersey Board of Regulatory Commissioners because the complainant failed to list the channels included in the CPS tier or otherwise describe the cable programming service at issue. The complainant filed its complaints on a revised FCC Form 329, released by the Commission in January 1994, that does not require an itemization of the channels in the CPS tier. Operator argues that the revised FCC Form 329 is deficient because it does not request "a description of the cable programming service or associated equipment involved and, if applicable, how the service or associated equipment has changed."[12] Operator's argument does not persuade us that the complaints are invalid or should be dismissed. The Commission revised FCC Form 329 because experience had shown that the prior form requested unnecessary information and was confusing to many complainants. FCC Form 329 was therefore revised consistent with the Congressional mandate to avoid imposing unnecessarily "technical or com-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed an amended FCC Form 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). Operator also submitted additional information in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings. Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

[12] 47 C.F.R. § 76.951(b)(6).

plicated" pleading requirements on complainants.[13] In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint. These complaints clearly relate to Operator's price for the CPS tier. We therefore find the complaints valid and deny Operator's motion to dismiss.

6. Operator's monthly CPS tier price of $10.10 (plus franchise fee) is not justified by its benchmark filing because its price is greater than the maximum permitted charge of $9.98 per month (plus franchise fee), as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to Operator's calculations in Form 393:

> Operator calculated the Inflation Adjustment Factor (Part II, Worksheet 1, Line 127) as of the end of April 1994 using data released by the U.S. Department of Commerce on May 27, 1994. However, Operator's use of April 1994 as the date through which it calculated the inflation adjustment is impermissible. Operator was required to file a justification of its CPS price for the franchise areas no later than January 27, 1994.[14] If Operator had filed its justification in a timely fashion, the instructions to Form 393 would have required it to calculate the inflation adjustment only through December 1993.[15] Operator cannot be permitted to claim an additional inflation adjustment simply because it filed Form 393 late. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date on which Operator should have filed.[16] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate 1.034 as the Inflation Adjustment Factor through December 1993, the base date Operator should have used in justifying its rate.

7. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator has failed to justify the rate it was charging during the periods in question. Operator's showing justifies the maximum reasonable CPS tier price of $9.63 per month (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on the Appendix) to May 14, 1994.[17]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the areas referenced in the caption, and all other complaints in these franchise areas related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that Operator's motion to dismiss the complaints against its cable programming service price charged in the franchise areas referenced in the caption IS DENIED.

10. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities referenced in the caption that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on the Appendix)[18] to May 14, 1994 which exceeded the maximum price per month (plus franchise fee) of $9.63, plus interest to the date of the refund.

11. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price of $9.63 (plus franchise fee).[19]

13. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS price in the franchise areas addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith optional supplemental filings in response to our *Public Notice*.

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[13] *See* H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 64 (1992); *see also* Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5843-44, para. 339 (1993).

[14] 47 C.F.R. § 76.956(a) (operator must file a response within 30 days of the date of service of a complaint).

[15] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[17] This finding is based solely on the representations of Operator and the modification described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[19] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
NJ0083	2/28/94	2/25/94
NJ0111	2/28/94	2/25/94
NJ0345	2/28/94	2/25/94
NJ0365	2/28/94	2/25/94
NJ0366	1/3/94	12/28/93

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Port Townsend
Cable TV Limited Partnership
d/b/a Summit Cablevision

CUID No. WA0430 (Carnation)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: July 21, 1995; Released: August 4, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon the filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994 against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. §543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-125

In the Matter of

Amendment of Section 73.202(b), RM-8670
Table of Allotments,
FM Broadcast Stations.
(Saint Joseph, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 24, 1995; Released: August 4, 1995

Comment Date: September 25, 1995
Reply Comment Date: October 10, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Saint John's University ("petitioner"), seeking the allotment of Channel 260A to Saint Joseph, Minnesota, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for Channel 260A if the channel is allotted to Saint Joseph.[1]

2. We believe petitioner's proposal warrants consideration. Channel 260A can be allotted to Saint Joseph, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 4.6 kilometers (2.9 miles) south of the community.[2] The site restriction will prevent a short spacing to Station KXDL, Channel 259A, Browerville, Minnesota.

3. In view of the fact that the proposed allotment would provide a second local FM broadcast service to Saint Joseph, the Commission believes it would serve the public interest to solicit comments to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Saint Joseph, Minnesota	225C3	225C3, 260A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 25, 1995**, and reply comments on or before **October 10, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard J. Bodorff
Todd M. Stansbury
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

[1] Although petitioner does not seek to restrict the allocation of Channel 260A at Saint Joseph, it has stated that it intends to operate the facility on a noncommercial educational basis, if it is the successful applicant.

[2] The coordinates for Channel 260A at Saint Joseph are 45-31-24 and 94-18-48.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-126

In the Matter of

Amendment of Section 73.202(b), RM-8671
Table of Allotments,
FM Broadcast Stations.
(Denison-Sherman, Paris, Jackson,
Texas, and Madill, Oklahoma)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: July 25, 1995; Released: August 4, 1995

Comment Date: September 25, 1995
Reply Comment Date: October 10, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Hunt Broadcasting, Inc. ("petitioner"), licensee of Station KDVE(FM), Channel 269C3, Denison-Sherman, Texas, requesting the substitution of Channel 269C1 for Channel 269C3 at Denison-Sherman, Texas, and modification of its license to specify the higher powered channel. In order to accommodate this proposal, petitioner also requests the substitution of Channel 282C2 for Channel 270C2 at Paris, Texas, and modification of Station KBUS(FM)'s license; Channel 273A for Channel 272A at Madill, Oklahoma, and modification of Station KMAD(FM)'s license; and Channel 252A for Channel 269A, as well as, a change of site for Station KAIH(FM) at Jacksboro, Texas, and modification of Station KAIH(FM)'s construction permit.[1] Petitioner acknowledges its responsibility to reimburse the licensees of Stations KBUS(FM) and KMAD(FM) for the reasonable expenses they would incur in changing channels. Petitioner states it will apply for Channel 269C1, if allotted.

2. We believe petitioner's proposal warrants consideration since it could enable Station KDVE(FM) to expand its coverage area. Channel 269C1, Channel 282C2, Channel 252A and Channel 273A can be allotted to Denison-Sherman, Paris, Jacksboro, Texas, and Madill, Oklahoma, respectively, in compliance with the Commission's minimum distance separation requirements. Channel 269C1 can be allotted to Denison-Sherman without the imposition of a site restriction.[2] Channel 252A can be allotted Jacksboro, Texas, with a site restriction of 3.4 kilometers (2.1 miles) northwest to accommodate petitioner's upgrade.[3] As proposed, Channel 282C2 and Channel 273A can be allotted to Paris, Texas, and Madill, Oklahoma, respectively, at the transmitter sites specified Station KBUS(FM)'s and Station KMAD(FM)'s authorizations.[4] Therefore, we will direct an *Order to Show Cause* to the licensees of Station KBUS(FM) and Station KMAD(FM) as to why their licenses should not be modified to specify operation on Channel 282C2 and Channel 273A as proposed herein instead of the present Channel 270C2 and 272A.

3. As requested, we shall propose to modify the license of Station KDVE(FM) at Denison-Sherman, Texas, to specify operation on Channel 269C1. In accordance with Section 1.420(g) of the Commission's Rules we will not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional equivalent channel at Denison-Sherman.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Denison-Sherman, Texas	269C3	269C1
Paris, Texas	230C2, 270C2 299C2	230C2, 282C2 299C2
Jacksboro, Texas	269A	252A
Madill, Oklahoma	272A	273A

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Radio Station KMAD and Webster Broadcasting, Inc., respective licensees of Station KMAD(FM), Madill, Oklahoma, and Station KBUS(FM), Paris, Texas, SHALL SHOW CAUSE why their licenses SHOULD NOT BE MODIFIED to specify operation on Channel 273A and Channel 282C2 as proposed herein instead of Channel 272A and Channel 270C2.

6. Pursuant to Section 1.87 of the Commission's Rules, Radio Station KMAD and Webster Broadcasting, Inc., may not later than **September 25, 1995**, file a written statement showing with particularity why their licenses should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Radio Station KMAD and Webster Broadcasting, Inc. to furnish additional information. If Radio Station KMAD and Webster Broadcasting, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional in-

[1] We note that petitioner is the proposed assignee of Station KAIH(FM) pursuant to an assignment application (BAPH-950502G). However, by supplemental filing Albert L. Crain, current licensee of Station KAIH(FM), has consented in advance to relocate Station KAIH(FM)'s transmitter to clear the proposed substitution of Channel 269C1 for Channel 269C3 at Denison-Sherman.

[2] The coordinates for Channel 269C1 at Denison-Sherman are North Latitude 33-41-39 and West Longitude 96-34-38.

[3] The coordinates for Channel 252A at Jacksboro, Texas, are North 33-14-26 and West Longitude 98-11-16.

[4] The coordinates for Channel 282C2 at Paris, Texas, are North Latitude 33-45-04 and West Longitude 95-24-51. The coordinates for Channel 273A at Madill, Oklahoma, are North Latitude 34-06-24 and West Longitude 96-46-30.

formation furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Radio Station KMAD and Webster Broadcasting, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensees of Station KMAD(FM) and KBUS(FM):

Radio Station KMAD
P.O. Box 576
Madill, Oklahoma 73446
[Licensee of Station KMAD(FM)]

Webster Broadcasting, Inc.
231 S. LaSalle Street
Chicago, Illinois 60603
[Licensee of Station KBUS(FM)]

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **September 25, 1995**, and reply comments on or before **October 10, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Joseph P. Benkert
1610 Wynkoop Street, Suite 200
Denver, Colorado 802-1196
(Counsel for petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-128

In the Matter of

Amendment of Section 73.202(b), RM-8672
Table of Allotments,
FM Broadcast Stations.
(Carthage, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 28, 1995; Released: August 4, 1995

By the Chief, Allocations Branch:

Comment Date: September 25, 1995
Reply Comment Date: October 10, 1995

1. The Commission has before it a petition for rule making filed by Sharon K. Bryan ("petitioner"), proposing the allotment of Channel 230A to Carthage, Illinois, as that community's second local FM service. Petitioner states her intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 230A to Carthage, Illinois, since it could provide that community with its second local FM service. An engineering analysis has determined that Channel 230A can be allotted to Carthage in compliance with the Commission's minimum distance separation requirement without the imposition of a site restriction.[1]

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Carthage, Illinois	--	230A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 25, 1995**, and reply comments on or before **October 10, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John S. Neely
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Attorney for Petitioners)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

[1] The coordinates for Channel 230A at Carthage are North Latitude 40-24-48 and West Longitude 91-08-00.

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-129

In the Matter of

Amendment of Section 73.202(b), RM-8673
Table of Allotments,
FM Broadcast Stations.
(Colchester, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 28, 1995; Released: August 4, 1995

By the Chief, Allocations Branch:

Comment Date: September 25, 1995
Reply Comment Date: October 10, 1995

1. The Commission has before it a petition for rule making filed by Sharon K. Bryan ("petitioner"), proposing the allotment of Channel 240A to Colchester, Illinois, as that community's first local FM transmission. Petitioner states her intention to apply for the channel, if allotted.

2. We believe the public interest would be served by petitioner's proposal, since it could provide the community of Colchester with its first local FM service. However, an engineering analysis has determined that Channel 240A at Colchester is short-spaced to the frequency allotment site for Station KOKX-FM, Channel 237C1, Keokuk, Iowa. Therefore, in an effort to accommodate petitioner's proposal, we sought an alternate channel and have determined Channel 281A can be allotted to Colchester, Illinois, in compliance with the Commission's minimum distance separation requirements,[1] with a site restriction of 12.2 kilometers (7.6 miles) northwest of the community, in order to avoid a short-spacing to the licensed site of Station WMOS(FM), Channel 280A, Quincy, Illinois.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Colchester, Illinois	--	281A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 25, 1995**, and reply comments on or before **October 10, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John S. Neely
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Attorney for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 281A at Colchester, Illinois are North Latitude 40-31-26 and West Longitude 90-51-08.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-130

In the Matter of

Amendment of Section 73.202(b), RM-8674
Table of Allotments,
FM Broadcast Stations.
(Taylorville, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 28, 1995; Released: August 4, 1995

By the Chief, Allocations Branch:

Comment Date: September 25, 199
Reply Comment Date: October 10, 1995

1. The Commission has before it a petition for rule making filed by Miller Communications Inc., ("petitioner"), proposing the allotment of Channel 247A to Taylorville, Illinois, as that community's third local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 247A to Taylorville, Illinois, since it could provide that community with its third local FM service. An engineering analysis has determined that Channel 247A can be allotted to Taylorville in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.9 kilometers (4.9 miles) south.[1] in order to avoid a short-spacing to the licensed site of Station WHMS(FM), Channel 248B, Champaign, Illinois.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Taylorville, Illinois	224B1, 232A	224B1, 232A, 247A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 25, 1995**, and reply comments on or before **October 10, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia
Pepper & Corazzini
1776 K Street, N.W
200 Montgomery Building
Washington, D.C. 20006
(Attorney for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 247A at Taylorville are North Latitude 39-28-44 and West Longitude 89-18-36.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 3, 1995

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC record.

The decisions are placed in general docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Costa de Oro Television, Inc. - Petition for reconsideration - **Denied** (June 28, 1995). [See 47 C.F.R. Section 1.1108(b)(c)]

Cruze Electronics - Request for waivers of the annual regulatory fees for 38 television translator stations - **Granted** (June 28, 1995). [See FCC 95-257, para 16 (June 15, 1995)]

Davis, Gerald E. and Dunn, Jo Ann d/b/a Piketon Communications - Request for refund of a hearing fee for a new FM station at Piketon, Ohio - **Granted** (June 16, 1995). [See 47 C.F.R. Section 1.1112.]

Douglas TV Association, Inc. - Request for waiver of annual regulatory fees for a translator television system - **Granted** (June 28, 1995). [See 47 C.F.R. Section]

East Coast Communications Limited Partnership - Petition for reconsideration and motion to stay - **Denied** (June 22, 1995). [See FCC 95-257, para 16 (June 15, 1995)]

EXTECH Instruments Corp. - Petition for application review - **Denied** (June 20, 1995). [See 47 C.F.R. Sections 2.925,2.926]

Hansford County Translator System - Request for waiver of annual regulatory fees for a translator television station - **Granted** (June 28, 1995). [See FCC 95-257, para 16 (June 15, 1995)]

Jamestown TV Associates - Petition for waiver and petition to defer payment of regulatory fees for television station WTJA-TV - **Granted** (June 28, 1995). [See FCC 95-257, para 15 (June 15, 1995)]

Jones, Clarence E. - Request for waiver of regulatory fees for two stations at Elloree, South Carolina - **Granted** (June 28, 1995). [See FCC 95-257, para 15 (June 15, 1995)]

Montana 8 - Beaverhead Limited Partnership - Petition for reconsideration - **Denied** (June 28, 1995). [See 47 C.F.R. Section 1.1109(a)]

Pang, Courtland H L - Request for partial refund of fees submitted in connection with Marine Radio Station WYG6310 - **Granted** (June 28, 1995). [See 47 C.F.R. Section 1.1102.]

Paugus Television, Inc. - Request for decision to grant a reduction of regulatory fees be rescinded - **Granted** (June 27, 1995). [See 47 C.F.R. Section 1.1102.]

Shafer Translator, Inc. - Request for waiver of annual regulatory fees for a translator television system - **Granted** (June 28, 1995). [See FCC 95-257, para 15 (June 15, 1995)]

Sidney Broadcasting, Inc. - Request for waiver of regulatory fees for a radio Station at Sidney, Montana - **Granted** (May 11, 1995). [See FCC 95-257, para 15 (June 15, 1995)]

Translator Service Co., Inc. - Request for waiver of annual regulatory fees for a translator television system - **Granted** (June 28, 1995). [See FCC 95-257, para 15 (June 15, 1995)]

WMSI, Inc. - Request for review of the dismissal of an application filed for a new station at Neoga, Illinios - **Granted** (June 28, 1995). [See 47 C.F.R. Section 1.1111(a).]

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202) 418-1995.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 2 8 1995

William D. Goddard, Esq.
16 King Street
Morristown, New Jersey 07960

Dear Mr. Goddard:

This will respond to the petition for reconsideration, filed on behalf of Costa de Oro Television, Inc. ("Costa"), which seeks further review of the Billings and Collections Branch's decision to dismiss Costa's application to modify its low power television license. Costa's application was dismissed because it had failed to include FCC Form 155, the fee processing form, with its modification application and filing fee.

Costa concedes that it had failed to include FCC Form 155 with its submission, but nevertheless contends that its application should be reinstated nunc pro tunc. Costa maintains that the FCC Form 155 requirement is merely a procedural "ministerial matter" that should not result in the dismissal of its application, particularly since it had correctly identified the applicable fee code and fee amount in its modification application. Moreover, Costa asserts that a grant of its application will bring Spanish language programming throughout Ventura County, California, and thus public interest considerations dictate reinstatement of its application. Finally, Costa states that Commission staff "led [Costa's representative] . . . to believe that the FCC Form 155 was not needed." Costa's Petition for Reconsideration at 2-3.

Commission filing fees must be accompanied by FCC Form 155. Applications that are submitted without FCC Form 155 are subject to dismissal. See 47 C.F.R. Section 1.1108(b)(c); see also Establishment of a Fee Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3569-70 (1990)("Because the Fee Form is essential to the efficient processing of fees, the failure to submit the form will result in the dismissal of the underlying application. Similarly, if the fee associated with the code(s) entered on the form do not match the fee paid, the submission will be dismissed"). In LEOSAT Corporation, 8 FCC Rcd 668 (1993), the Commission dismissed a low-Earth orbit satellite application for failure to include an FCC Form 155 with its submissions. The Commission rejected arguments that inclusion of the FCC Form 155 was a mere technicality. The Commission stated:

> [T]he Form 155 requirement is of such importance to the administration of the Commission's fee program that it is a prerequisite to acceptance of an application. The purpose of the Form 155 requirement is not . . . to enable the efficient processing of applications but to enable the efficient and cost effective

> processing of fees. With the expected three-fold increase in feeable applications occasioned by the new Schedule of Charges, the Commission sought to utilize the most cost-efficient method of cash management in collecting fees and to ensure the rapid deposit of funds. The new Form 155 requirement was a critical and necessary part of achieving these objectives, as it would make it possible for the lockbox bank to make the initial determination of whether the correct fee had been paid without reading the underlying materials . . . .

Id. at 671. Costa's public interest arguments unfortunately do not outweigh the Commission's overriding interest in maintaining the integrity and efficiency of the fee collection program through strict enforcement of this procedural requirement. As the Commission stated in LEOSAT Corporation, "Such claims could be made by virtually any applicant and, if accepted, would vitiate the Form 155 requirement." Id. at 671.

Finally, it should be noted that the Commission has held that reliance upon informal staff advice will not excuse an applicant's failure to comply with Commission requirements. See Mary Ann Salvatoreillo, 6 FCC Rcd 4705, 4707-08 (1991); Texas Media Group, Inc., 5 FCC Rcd 2851, 2852 (1990); Camelot, Inc., 61 FCC 2d 15,16 (1976).

Based on the foregoing, reinstatement of Costa's application is not warranted. Accordingly, Costa's petition for reconsideration is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 28 1995

Arnold Cruze
Cruze Electronics
P.O. Box 397
1905 Palo Duro St.
Memphis TX. 79245

Re: Request for Waiver of Annual Regulatory Fees

Dear Mr. Cruze;

This is in response to your request for waivers of the annual regulatory fees for 38 television translator stations operated by Cruze Electronics.

You maintain that Cruze's only source of income is a system of voluntary donations from the rural families served by its translator stations, and that none of the translator systems have sufficient funds to pay the regulatory fees.

In implementing the regulatory fee program, the Commission stated that it would waive its regulatory fees for any translator station that:

> (1) is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from the members of the community served for support.

Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 16 (June 15, 1995). The Commission further held, however, that the burden will remain on the translator licensees to document and substantiate their eligibility for the waiver.

It appears that Cruze's translator stations are not licensed to, and do not have common ownership with, any commercial broadcast stations, that they do not sell advertising, and that their sole source of income is derived from the voluntary donations of families in the communities served by the translators. Under these circumstances, Cruze Electronics's annual regulatory fees for FY 1994 are waived.

If you have any questions concerning the regulatory fees, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 14 1995

T. Michael Jankowski, Esquire
Collier, Shannon, Rill & Scott
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007

Dear Mr. Jankowski:

This is in response to your request for refund of the hearing fee submitted by Gerald E. Davis and Jo Ann Dunn, d/b/a Piketon Communications, former applicant for a new FM station at Piketon, Ohio.

You state that because Piketon's application was dismissed for failure to submit a hearing fee, Piketon is entitled to a refund of the filing fee. In this connection, prior to Piketon's designation for a comparative hearing to select the licensee for the station at Piketon, Ohio, Piketon's application was dismissed because its hearing fee was not filed. Subsequently, Piketon filed a Petition for Reconsideration submitting the hearing fee and requesting reinstatement of its application, nunc pro tunc. On March 6, 1992, the petition was denied. Piketon thereupon filed an Application for Review which was denied on June 27, 1994, See 9 FCC Rcd 3016 (1994). On July 26, 1994, Piketon filed a Notice of Appeal in the United States Court of Appeals for the D.C. Circuit. In your letter, you now indicate that Piketon has decided to move to voluntarily dismiss its appeal to the D.C. Circuit.

Applicants that are not designated for hearing are entitled to refund of their hearing fees. Proposals to Reform the Commission's Comparative Hearing Process, 6 FCC Rcd 157, 158 (1991), clarified, 6 FCC Rcd 3403, 3409 (1991). In this instance, Piketon was never formally subject to the Commission's comparative hearing process because its application was dismissed. Accordingly, your request for refund is granted.

A check, drawn in the amount of $6,760.00 and payable to Gerald E. Davis and Jo Ann Dunn, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

8317

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 28 1995

Ms. Sylvia Mittelstaedt
Secretary
Douglas TV Association, Inc.
1141 State Highway 2
Waterville, WA 98858-9719

Re: Douglas TV Association, Inc.
Fee Control # 9408038835078013
Fee Paid: $405

Dear Ms. Mittelstaedt:

This is in response to your request for a waiver of the annual regulatory fees for the translator television system operated by the Douglas TV Association, Inc. (Douglas).

You maintain that Douglas operates low-powered translator stations and is dependent on voluntary contributions from 28 donors for funds to operate its translator system. You contend that the regulatory fees of $405 would create a financial hardship.

In implementing the regulatory fee program, the Commission stated that it would waive its regulatory fees for any translator station that:

> (1) is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from the members of the community served for support.

Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 16 (June 15, 1995). The Commission further held, however, that the burden will remain on translator licensees to document their eligibility for the waiver.

It appears that Douglas's translator stations are not licensed to, and do not have common ownership with, any commercial broadcast stations, that they do not sell advertising, and that their sole source of income is derived from the voluntary donations of families in the community served by the translators. Under these circumstances, Douglas's annual regulatory fees for FY 1994 are waived.

A check, made payable to the maker of the original check in the amount of $405, will be sent to you at the earliest practicable time.

If you have any questions concerning this refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 2 2 1995

Gregg P. Skall, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Washington, D.C. 20006

Jeffrey D. Southmayd, Esq.
Southmayd & Miller
1233 20th Street, N.W.
Suite 205
Washington, D. C. 20036

Re: Fee Control # 9302228170417001

Dear Messrs. Skall and Southmayd:

This responds to a petition for reconsideration and motion to stay filed on behalf of East Coast Communications Limited Partnership ("East Coast"), former applicant for a new FM station at Harkers Island, North Carolina, an opposition filed on behalf of Hope Communications, Inc. ("Hope"), and a reply to the opposition filed by East Coast.

East Coast's application was dismissed by the Chief, FM Branch for failure to remit its hearing fee in accordance with the deadline established by the October 30, 1992, public notice. That public notice announced that East Coast's application was mutually exclusive with that of Hope's, and established January 6, 1993, as the hearing fee payment deadline.

East Coast contends that its application should be reinstated nunc pro tunc. East Coast challenges the Commission's procedure for establishing hearing fee deadlines by public notice, and maintains that applicants should receive personal notice of such deadlines. Hope opposes East Coast's petition for reconsideration. Hope states that the Commission's procedure for establishing hearing fee deadlines had been in effect since 1991, over a year before East Coast had filed its application, and that East Coast has failed to demonstrate good cause for failing to comply with the Commission's established procedural deadline.

In the absence of timely tendered fee payments, applications are subject to immediate dismissal. See 47 U.S.C. Section 158 (c)(2); 47 C.F.R. Sections 1.1108 and 1.1115. East Coast failed to tender its fee payment in a timely manner, and its application appropriately was dismissed. East Coast does not advance any arguments that would warrant reinstatement of its application. Indeed, the Commission addressed and rejected the same arguments that East Coast has made in Macon County Broadcasting, Inc.. 8 FCC Rcd 8669 (1993), a copy of which is attached.

In Macon County Broadcasting, Inc., the Commission stated that section 73.3573, 47 C.F.R. Section 73.3573, clearly provides that hearing fee deadlines will be established by public notices, which are issued shortly after the initial filing of mutually exclusive applications. The Commission further characterized the hearing fee deadline as a procedural requirement that has been properly adopted and that has been "strictly adhered to in the interest of orderly, efficient and predictable administration of the Commission's processes." Id. at 8669. Moreover, the Commission stated that the Communications Act does not require that applicants be afforded personal notice of procedural deadlines, and that it thus "is incumbent upon applicants to prosecute diligently their applications by ascertaining and complying with the applicable filing deadlines established by public notices." Id. Here, East Coast had failed to ascertain and comply with the January 6, 1993, hearing fee deadline.

Based on the foregoing, East Coast's petition for reconsideration and motion for stay is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

Attachment

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 2 1995

Mr. Gerald W. Blakeley, III, President
EXTECH Instruments Corporation
335 Bear Hill Road
Waltham, Massachusetts 02154

Re: Fee Control # 9312088315208004

Dear Mr. Blakeley:

This will respond to your request for review of the dismissal of the equipment authorization application submitted on behalf of EXTECH Instruments Corporation ("EXTECH"). You state that EXTECH's application was dismissed because it had specified an FCC Identifier that the Commission had previously issued.

As part of the Commission's equipment authorization process, approved equipment must be identified with a unique FCC Identifier, which consists of the grantee's permanent code and the particular equipment's number/product code. See 47 C.F.R. sections 2.925, 2.926. This identification requirement provides a systematic method by which Commission approved equipment can readily be identified. Applications for equipment authorizations often are dismissed, without any engineering review, for reasons of a defective FCC Identifier. The Commission has recognized that it may be unfair to require the applicant/grantee to refile its application with an additional fee payment merely to correct such errors or deficiencies. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Act of 1985, 2 FCC Rcd 947, 964 (1987). In such cases, the Commission has indicated that it may be appropriate to apply section 1.1108(d) of the Commission's rules, 47 C.F.R. section 1.1108(d), which permits the staff to return the application without requiring an additional fee upon resubmission. Section 1.1108(d) requires the applicant to resubmit the corrected application either to the processing Bureau or the lockbox bank, as appropriate, and states that applicant will forfeit the original fee payment if the applicant fails to resubmit a corrected application.

Based on the foregoing, we conclude that EXTECH's application was appropriately dismissed because it specified an existing FCC Identifier. If EXTECH chooses to resubmit its application with a new FCC Identifier, it will be required to include an additional $110.00 fee payment (to reflect the current $845.00 fee specified in the applicable fee schedule contained in 47 C.F.R. Section 1.1103(1)), together with the relevant documentation, as specified in section 1.1108(d), to the lockbox bank. In the event that EXTECH fails to resubmit its application, its original $735.00 fee payment will be forfeited.

Accordingly, your request for review of the dismissal of EXTECH's equipment authorization application is denied. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 28 1995

Mr. E. J. Riley
President
Hansford County Translator System
P.O. Box 827
Gruver, Texas 79040

Re: Request for Waiver of Regulatory Fees

Dear Mr. Riley

This is in response to your request for a waiver of the annual regulatory fees for the translator television stations operated by the Hansford County Translator System.

You maintain that you have operated the translator system as a community service for almost 30 years, that your sole source of financial support is voluntary donations from the families served, that you average $560 a year in collections over and above expenses, and that you cannot afford pay the $540 regulatory fee which would ordinarily be assessed for your four television translator stations.

In implementing the regulatory fee program, the Commission stated that it would waive the regulatory fees for any translator station that:

> (1) is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from the members of the community served for support.

Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 16 (June 15, 1995). The Commission further held, however, that the burden will remain on the translator licensees to document ~~and~~ substantiate their eligibility for the waiver.

It appears that the Hansford County Translator System's stations are not licensed to, and do not have common ownership with, any commercial broadcast stations, that they do not sell advertising, and that their sole source of income is derived from the voluntary donations of families in the communities served by the translators. Under these circumstances, Hansford County Translator System's annual regulatory fees for FY 1994 are waived.

If you have any questions concerning the fee program, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 2 0 1995

Mr. Craig L. Fox
General Partner
Jamestown TV Associates
4853 Manor Hill Dr.
Syracuse, New York 13215-1336

Re: Request for Waiver of Regulatory Fees

Dear Mr. Fox:

This is in response to the Petition for Waiver and Petition to Defer Payment of Regulatory Fees on behalf of Jamestown TV Associates (Associates) licensee of Television Station WTJA-TV, Jamestown, New york. In the petition you requested that the Commission waive the regulatory fee to be paid by Associates for Fiscal Year (FY) 1994.

You allege that because of Associates' financial difficulties and antenna problems it requested and was granted permission to cease operations (go dark) by the Commission. You maintain that Associates cannot afford the $9,600 regulatory fee, and that payment of the fee would interfere with WTJA-TV's return to the air.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 15 (June 15, 1995), the Commission determined that the imposition of a regulatory fee could be an impediment to the restoration of service by dark stations and that it would, therefore, waive the fee requirement for stations which have ceased operation.

Accordingly, your petition is granted and the FY 1994 regulatory fee for Jamestown TV Associates is waived. The waiver shall remain in effect until Television Station WTJA-TV is reactivated.

If you have any questions concerning the regulatory fee, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 26 1995

Leonard S. Joyce, Esquire
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015

Re: Clarence E. Jones
Petition for Waiver of Regulatory Fee

Dear Mr. Joyce:

This is in response to the petition for waiver of the Fiscal Year 1994 regulatory fee that you filed on behalf of Radio Stations WMNY(AM) and WORG(FM), Elloree, South Carolina, licensed to Clarence E. Jones.

You maintain that the stations have been dark since April 28, 1994, that the licensee has exhausted his funds, and therefor is unable to pay his regulatory fee.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 15 (June 15, 1995), the Commission determined that the imposition of a regulatory fee could be an impediment to the restoration of service by dark stations and that it would therefore waive the fee requirement for stations which had ceased operation.

Accordingly, your petition is granted and the FY 1994 regulatory fees for Clarence E. Jones are waived. The waiver shall remain in effect until Radio Stations WMNY(FM) and WORG(FM) are reactivated.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 2 8 1995

Mr. Harold Mordkofsky, Esq.
Mr. Robert M. Jackson, Esq.
Blooston, Mordkofsky, Jackson & Dicken
2120 L Street, N.W.
Suite 300
Washington, D.C. 20037

Re: Fee Control # 000000BCB-95-030

Dear Messrs. Mordkofsky and Jackson:

This responds to a petition for reconsideration filed on behalf of Montana 8 -- Beaverhead Limited Partnership ("Partnership"), licensee of a domestic public cellular radio telecommunications service that serves a rural service area.

On September 29, 1994, the Partnership filed its notification, advising the Commission that it had expanded its system pursuant to 47 C.F.R. Section 22.31(f)(1). The Partnership included, with its notification, its fee payment -- a check that was inadvertently dated September 27, 1990, instead of September 27, 1994. The Partnership's notification was dismissed by the Chief, Billings and Collection Branch for failure to submit an acceptable check.

The Partnership contends that its notification should be reinstated nunc pro tunc. Specifically, the Partnership states, and provides a copy of its ledger that demonstrates, that the check actually was drawn on September 27, 1994, but was inadvertently misdated through a clerical error by its application preparer, a retained management service. The Partnership asserts that the check was not "stale," that there were sufficient funds to cover the check, and that had it been presented to the bank for payment it would have been paid. Finally, the Partnership argues that reinstatement of its notification and acceptance of its fee submission is crucial, because its five-year fill-in period expired on the filing date, September 29, 1994, and otherwise it will be subject to competitive filings.

The Commission's rules explicitly provide that "personal or corporate checks dated more than six months prior to their submission to the Commission's lockbox bank and postdated checks will not be accepted and will be returned as deficient." 47 C.F.R. Section 1.1109(a). The acceptance of such checks generally would undermine the basic objectives of the Commission's fee collection process, that fees be collected in the most efficient manner possible. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 948 (1987). The Partnership's check indisputably was dated more than six months prior to the submission, and thus was returned together with the accompanying notification.

It should be noted that the Commission may waive filing fees upon a showing of good cause and a finding that the public interest will be served thereby. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd at 961; see also 47 C.F.R. §§1.1116. We note that the Partnership cannot rely simply on the inadvertent errors of its application preparer in establishing good cause. Cf. Satellite Cellular Systems, 4 FCC Rcd 4477, 4478 n. 5 (1989). Nevertheless, the Partnership's documentation established that the check was not "stale" and, in fact, was drawn on September 27, 1994, two days prior to its submission. More importantly, the Partnership has shown that the public interest would be served by the grant of the waiver, by ensuring that service to the public continues, in a rural region, without any disruption or delay. See 47 C.F.R. Section 22.9(b)(1). Thus, we find that the Partnership has made the requisite showing, which would warrant a waiver. However, we find that the Partnership also should be required to substantiate its claim that there were sufficient funds to cover the misdated check. Cf. Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 3 FCC Rcd 5987, 5992 (1988)(where an applicant makes a convincing showing, including a statement from its bank, that failure to honor a fee payment was due to bank error, the application will be reinstated nunc pro tunc). Specifically, the Partnership should present a statement from its bank indicating that there were sufficient funds to cover the check dated 9/27/90, and that the check would have been honored had it been presented to the bank for payment.

At this juncture, although the Partnership has demonstrated that a waiver is warranted, it also must show that its misdated check was covered by sufficient funds and that it would have been honored by the Partnership's bank. Thus, based on the present state of the record, the Partnership's petition for reconsideration will be denied without prejudice. If you have any questions concerning this matter, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 2 0 1995

Mr. Courtland H.L. Pang
1213 Komo Mai Drive
Pearl City, HI 96782-1831

Re: Fee # 9409298290176022
Amt. Paid: $115
Marine Station WYG6310

Dear Mr. Pang:

This is in response to your request for partial refund of the $115 in fees that you paid for Marine (Ship) Radio Station WYG6310. Until July 15, 1994, the filing fee for Marine (Ship) Radio Stations was $35. Effective July 18, 1994, the filing fee was increased to $45. Also, on July 18, Marine (Ship) Radio Station licensees became subject to a $7 per year regulatory fee, payable in advance for the ten year life of their license term ($70), and were required to pay this fee, in its entirety, with the filing of their applications. 47 C.F.R. § 1.1102. You assert that the Commission failed to give you sufficient advance notice to allow you to file your renewal application and pay a $35 fee by July 15, 1994.

The record indicates that the Commission's licensing branch mailed your renewal notice on July 5, 1994, and that you prepared a check for $35 on July 13, 1994, and completed the renewal application on July 14, 1994, but that your payment was not received until July 18, 1994, the effective date for the new fees. As a result, the renewal application and $35 fee were returned. You subsequently refiled your renewal application with $115 in fees.

We agree that under these circumstances a substantial question is raised concerning whether you had sufficient opportunity to file your renewal application before the increase became effective. Thus, the Commission will assess your application with the $35 renewal fee, which was in effect until July 15, 1994, and waive the requirement that you pay the increased filing fee and regulatory fee.

Accordingly, your request is granted, and you are assessed a Marine (Ship) Station renewal filing fee of $35 for Fiscal Year 1994. Crediting the $115 you tendered for payment of the fees, we will refund $80. A check in the amount of $80 will be sent to you at the earliest practicable time.

If you have any questions concerning the fee or the refund, please call the Chief, Fee and Mail Branch, Customer Services Division, at (717) 337-1531.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 2 7 1995

Margaret L. Miller
Attorney at Law
1255 Twenty-Third Street
Washington, DC 20037-1194

Re: Paugus Television, Inc.
Regulatory Fee Paid of $14,400

Dear Ms. Miller:

This is to confirm your letter of June 7, 1995, on behalf of Paxson Boston License, Inc. licensee of Television Station WGOT-TV, Merrimack, New Hampshire in response to our May 26, 1995, letter directed to the station's previous owner, Paugus Television, Inc.

As indicated in your letter, Paxson, the new owner, now considers WGOT-TV to be a Boston ADI station and that service will not be limited to Merrimack, New Hampshire, but to the entire Boston ADI. Therefore, you are requesting that the decision to grant a reduction of the Fiscal Year 1994 regulatory fee for Paugus be rescinded.

Accordingly, your request is granted. The approval of the request to reduce the Fiscal Year 1994 regulatory fee for Paugus Television, Inc., WGOT-TV now known as Paxson Boston License, Inc., is hereby rescinded. Moreover, in view of these facts, the referenced fee payment will not be refunded, but will be retained and treated as completing payment of WGOT-TV's Fiscal Year 1994 regulatory fee.

If you have any questions concerning this decision, please contact Thomas M. Holleran at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 2 6 1995

Mr. Larry Miller
Shafer Translator, Inc.
2111 Oklahoma Avenue
Woodward, Oklahoma 73801

Re: Request for Waiver of Regulatory Fees

Dear Mr. Miller:

This is in response to your request for a waiver of the annual regulatory fees for the translator television system operated by Shafer Translator, Inc.

Shafer operates low-powered translator stations at four sites in rural areas. You maintain that Shafer is dependent on voluntary contributions from approximately 1000 households for funds to operate its translator system.

In implementing the regulatory fee program, the Commission stated that it would waive its regulatory fees for any translator station that:

> (1) is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from the members of the community served for support.

Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 16 (June 15, 1995). The Commission further held, however, that the burden will remain on the translator licensees to document and substantiate their eligibility for the waiver.

It appears that Shafer's translator stations are not licensed to, and do not have common ownership with, any commercial broadcast stations, that they do not sell advertising, and that their sole source of income is derived from the voluntary donations of families in the communities served by the translators. Under these circumstances, Shafer's annual regulatory fees for FY 1994 are waived.

If you have any questions concerning this refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 2 8 1995

KGCX, Inc.
Sidney Broadcasting Inc.
906 16th Avenue West
Williston, ND. 58801

Re: Sidney Broadcasting, Inc
KGCX, Inc.
Request for Waiver of Regulatory Fees

Dear Sir:

This is in response to your request for waiver of regulatory fees filed on behalf of KGCX, Inc., licensee of Radio Station KGCX-AM, Sidney, Montana, and Sidney Broadcasters, Inc., licensee of Radio Station KGCH-FM, Sidney, Montana.

You maintain that the subject stations are not operating and that they do not have sufficient funds to pay the FY 1994 regulatory fee.

In Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 15 (June 15, 1995), the Commission determined that the imposition of a regulatory fee could be an impediment to the restoration of service by dark stations and that it would therefore waive the fee requirement for stations which had ceased operation.

Accordingly, your request is granted and the FY 1994 regulatory fees for KGCX, Inc., and for Sidney Broadcasters, Inc., are waived. The waiver shall remain in effect until Radio Stations KGCX-AM and KGCH-FM are reactivated.

If you have any questions concerning the regulatory fee, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 2 3 1995

John Wells King, Esquire
Haley, Bader & Potts
4350 North Fairfax Dr.
Suite 900
Arlington, VA 22203-1633

Re: Translator Service Co., Inc.
Request for Waiver of Regulatory Fees

Dear Mr. King:

This is in response to your request for a waiver of the annual regulatory fees for the translator television system operated by Translator Service Co., Inc. (TSC) at Estes Park, Colorado.

You maintain that TSC is dependent on voluntary contributions from viewers and listeners in the service area of the translators. You contend that the regulatory fees of $405 would create a financial hardship.

In implementing the regulatory fee program, the Commission stated that it would waive its regulatory fees for any translator station that:

> (1) is not licensed to, in whole or in part, and does not have common ownership with, the licensee of a commercial broadcast station; (2) does not derive income from advertising; and (3) is dependent on subscriptions or contributions from the members of the community served for support.

Implementation of Section 9 of the Communications Act, FCC 95-257, ¶ 16 (June 15, 1995). The Commission further held, however, that the burden will remain on the translator licensees to document and substantiate their eligibility for the waiver.

It appears that TSC's translator stations are not licensed to, and do not have common ownership with, any commercial broadcast stations, that they do not sell advertising, and that their sole source of income is derived from the voluntary donations of families in the communities served by the translators. Under these circumstances, TSC's annual regulatory fees for FY 1994 are waived.

If you have any questions concerning the regulatory fee, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Mr. Gene A. Bechtel, Esq.
Bechtel & Cole
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036

Re: Fee Control # 000000BCB-95-003

Dear Mr. Bechtel:

This is in response to your request for review of the dismissal of the construction permit application filed on behalf of WMS1, Inc. ("WMS1"), for a new FM station at Neoga, Illinois.

You state that the Chief, Billings and Collections Branch, dismissed WMS1's application for failure to remit its fee payment. You represent that the fee payment was included with the application package, that the courier service delivered the package without disturbing its contents, and that the check was apparently lost since it has not "surfaced at [your] bank." You also state that you have enclosed a copy of the original check, number 4416, and that you have retendered the application with a substitute check. You request that the retendered application receive nunc pro tunc treatment, given that the application was filed on a first-come, first served basis.

Absent tendered fee payments, applications are subject to immediate dismissal, lose their place in the processing lines, and are not accorded nunc pro tunc treatment. See 47 U.S.C. Section 158(c)(2); 47 C.F.R. Section 1.1111(a); see also Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 956-57 (1987). Whereas the Commission's rules do not provide explicitly for the reinstatement of lost applications, the Commission has instituted a date stamp/receipt procedure to allay any concerns occasioned by lockbox bank filings. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3564-65 (1990). Under this procedure, the applicant must furnish certain documentation demonstrating that the application was filed in a timely fashion (i.e., a courier's receipt, a Commission date stamped copy of the application).

Because you are only claiming that WMS1's tendered fee was lost, as opposed to its entire application, we believe that you should be required to make a convincing showing to support your claim that the check was in fact drawn, but subsequently lost. For instance, you might want to include a copy of the original check, and or a copy of your cash disbursement ledger, to show that the check, in fact, was written. Cf. Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1985, 3 FCC Rcd

5987, 5992 (1988)(where an applicant makes a convincing showing that failure to honor the fee payment was due to bank error, the application will be reinstated and the date of the original submission will be considered the date of the subsequent filing). Your employee's affidavit attesting to the fact that the fee check was drawn and attached to the application, will not suffice, particularly since you have indicated that you were enclosing a copy of the original check, which you have failed to do.

At this juncture, you have not made the requisite showing sufficient to warrant reinstatement of the application. Based on the present state of the record, your request for reinstatement of the original application will be denied without prejudice.

If you have any questions concerning this matter, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Complaint of Fant Broadcasting Company of Nebraska, Inc. against Douglas Cable Communications, L.P. CSR 4483-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: July 10, 1995 Released: July 17, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On March 10, 1995, Fant Broadcasting Company of Nebraska, Inc. ("Fant"), licensee of commercial Stations KHGI-TV (ABC, Channel 13), Kearney, Nebraska; KSNB-TV (ABC, Channel 4), Superior, Nebraska; and KWNB-TV (ABC, Channel 6), Hayes Center, Nebraska (collectively "the Stations"), filed a complaint against Douglas Cable Communications, L.P. ("Douglas"), an operator of cable systems serving the following Nebraska communities: Blue Springs, Clatonia, Dewitt, Dorchester, Gresham, Hallam, Hickman, Osceola, Plymouth, Shelby, Stromsburg, Waco, and Wilbur. Fant requests that the Commission order Douglas to commence carriage of KSNB-TV[1] in the communities. Douglas filed an opposition to the complaint on April 13, 1995, to which Fant replied on April 26, 1995.

BACKGROUND

2. In support of its petition, Fant argues that KSNB-TV is a local commercial television station with respect to the systems at issue because it is licensed to Superior, Nebraska, which is in the Lincoln-Hastings-Kearney Area of Dominant Influence ("ADI"), and all of the systems at issue are also in that ADI. Fant maintains that Douglas has failed to comply with 47 C.F.R. §76.56(b), which requires a cable system with more than 12 usable activated channels to carry local commercial television stations on up to one-third of these channels.[2] Furthermore, Fant contends that in denying KSNB-TV carriage on the basis that the station does not provide the minimum required signal strength at the headends at issue, Douglas has relied on tests that fail to comply with the Commission's requirements for good engineering practices. Specifically, Fant contends that each of the tests in the 13 subject communities fail to comply with the requirement for multiple readings, that at least nine of the tests fail to comply with the requirement that the tests be taken at a reasonable height and with equipment similar to that used to pick up other stations in a similar frequency range and at similar distances to KSNB, and that documentation for four of the tests fails to demonstrate that the test antenna was properly oriented. Fant maintains that Douglas' failure to comply with Commission rules "is part of an on-going strategy to deny KSNB information needed to exercise its statutorily mandated must-carry rights . . . ." According to Fant, this strategy is evidenced by the correspondence between Fant and Douglas beginning with letters dated late May and early June 1993 from the Stations to Douglas requesting information regarding each of the systems, and ending with a January 3, 1995 letter requesting additional signal quality information and carriage on those systems where Douglas found KSNB's signal quality to be adequate. Finally, Fant asserts that Douglas has failed to accept its offer to provide the necessary equipment to ensure adequate signal strength at each of the systems' headends.

3. In its opposition, Douglas argues that the Commission should deny Fant's petition on procedural grounds. First, Douglas points out that under §76.56(b)(1) of the Commission's Rules, the Gresham system is exempt from the must-carry rules because the system has had continuously since October 5, 1992 twelve (12) usable activated channels and sixty-two (62)

[1] According to Fant, KSNB-TV and KWNB-TV are satellites of KHGI-TV, and KSNB-TV is the Fant station closest to the headends at issue here.

[2] In its reply, Fant concedes that the Gresham system is not subject to must-carry requirements because it has 12 channels and only 62 subscribers. Reply at 1; *see also* Opposition at 1.

subscribers, and that it has not deleted from carriage any broadcast television station. Second, as to the remaining subject cable systems, Douglas argues that Fant's complaint should be dismissed because it was filed after the applicable 60 day statute of limitations had expired. Douglas maintains that Fant's complaint was filed on March 10, 1995, more than one year after Douglas denied its must-carry demands. Douglas contends that it denied carriage on each of the subject systems in December 1993 based upon the failure of KSNB-TV to deliver an adequate signal to the cable system headends. Specifically, Douglas points to the November 24, 1993 letter from the Stations' prior owner to Douglas demanding carriage or additional signal quality testing and stating that "if Douglas fails to comply with the above requests, [KSNB-TV] is entitled to file a formal complaint with the FCC 30 days from today."[3] In response to these demands, Douglas asserts that it subsequently conducted additional signal quality tests and on December 3, 1993 informed the Stations by fax that the signal quality at each of the headends was insufficient to meet must-carry requirements, and also provided answers to follow-up questions from the Stations. Douglas states that it had no further communication with the Stations until it received the second demand for carriage from Fant on January 3, 1995. Douglas denies that its January 10, 1995 response to this letter triggered the start of the 60 day statutory filing period.

4. Finally, Douglas maintains that in the alternative, even if it did not affirmatively deny the request for carriage in December 1993, the time for response and denial has also long since passed. Douglas contends that the specific event triggering the start of the 60 day time limit, as set out in the Commission's Rules, is either the cable operator's written denial of a request for carriage, or a cable operator's failure to respond to such request within the time period allowed by §76.61(a)(2). Thus, Douglas argues that even if its December 3, 1993 fax was not sufficient to constitute a "denial", the 60 days since Douglas' 30 day time limit to respond to the Station's November 24, 1993 letter has long since passed.

5. Fant emphasizes in its reply that Douglas did not contest the facts stated in the Complaint, but that it attempts to argue that Fant is not entitled to relief solely because its Complaint was not timely filed. Fant argues that such an application of the Commission rules would discourage informal negotiations and promote the filing of complaints that needlessly waist the Commission's time and resources. Fant argues that its showing is undisputed and the Commission, therefore, should grant the Complaint. In addition, Fant asserts that there was no triggering event until the January 10, 1995 letter from Douglas to counsel for Fant, and that prior to that time, Douglas responded in a timely manner to Fant's correspondence and did not directly deny carriage requests. Fant further replies that nothing in the December 3, 1993 fax from Douglas constituted a refusal to carry KSNB-TV, and that in fact the letter invited Fant to contact Douglas if further information was desired.

DISCUSSION

6. We are persuaded by the arguments raised by Douglas in its opposition. We find the language of KSNB-TV's November 24, 1993 letter to be a request for carriage. The demand that "[w]here [KSNB-TV] has demonstrated a sufficient signal, [Douglas] commence carriage of the . . . station within 45 days" is clearly a signal carriage request. This interpretation is reinforced by the additional statement in the conclusion of that same correspondence that "if Douglas fails to comply with the above requests, [KSNB-TV] is entitled to file a formal complaint with the FCC 30 days from today." Accordingly, we agree with Douglas that the November 24, 1993 letter from the Stations triggered the 30-day period for a response, and that Douglas' lack of response within 30 days was the specific event triggering the start of the 60-day time limit.[4]

7. The rules setting forth the must carry complaint procedures are quite clear. "No must-carry complaint will be accepted by the Commission if filed more than sixty (60) days after . . . [t]he failure to respond to [a request for carriage] within the time period allowed by §76.61(a)(2)."[5] Fant's complaint was filed on March

[3] *See* Opposition, Exhibit A, November 24, 1993 letter from the Stations to Douglas.

[4] *See* 47 C.F.R. §76.61(a)(2).

[5] 47 C.F.R. §76.7(c)(4)(iii).

10, 1995, more than 14 months after Douglas effectively denied the Station's carriage request made on November 24, 1993. Because of this, Fant's complaint must be dismissed.[6]

ORDER

8. Accordingly, IT IS ORDERED, that the petition (CSR-4483-M) filed March 10, 1995 by Fant Broadcasting Company of Nebraska, Inc., IS DISMISSED as untimely filed.

9. These actions are taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[6] Because we resolve the case on these grounds, we need not reach the issue of whether the Stations meet all the necessary qualifications for carriage.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Complaint of North Texas Broadcasting Corp. against The Las Colinas Association — CSR-4161-C

Retransmission Consent Complaint

MEMORANDUM OPINION AND ORDER

Adopted: July 10, 1995 Released: July 17, 1995

By the Chief, Cable Services Bureau:

1. In the captioned proceeding, North Texas Broadcasting Corp., licensee of Station KXAS-TV (NBC, Ch. 5), Fort Worth, Texas, filed a complaint against The Las Colinas Association ("Association"), operator of a cable television system serving Las Colinas, Texas,[1] for the Association's apparent violation of the retransmission consent provisions of Section 325 of the Communications Act of 1934, as amended. The Association has filed an opposition to this petition to which KXAS-TV has replied.

2. In support of its petition, KXAS-TV states that on June 11, 1993, it notified the Association by letter that it was electing retransmission consent status pursuant to Section 325(b)(3)(B) of the 1992 Cable Act and Section 76.64(f)(1) of the Commission's Rules. It requested that the Association cease carriage of its signal pending a retransmission consent agreement. On September 8, 1993, KXAS-TV indicates that it received a letter from the Association which averred that it was not subject to the Commission's retransmission consent rules since it did not "make available for purchase, by subscribers or customers . . . video programming" pursuant to Section 602(12) of the Act and Section 76.64(d) of the rules. KXAS-TV argues that it believes the Association's interpretation of these sections to be in error since it does assess a fee to its subscribers for its services. It therefore requests the Commission to order the Association to cease carriage of its signal pending a consent agreement.

3. In its opposition, the Association sets forth a detailed description of its system. In short, it states that while the cable system it oversees is available throughout the Las Colinas residential community it does not directly provide services into an individual's home or building. Rather, it maintains, each member is responsible for the costs associated with the purchase and installation of the cable conduit necessary to receive services and for individual maintenance. Moreover, the Association continues, the costs of this service is part of an overall property owner's assessment fee which includes, in addition, items such as architectural control, parks maintenance, security patrol, etc. No individual is billed separately for cable service and no individual assessment is affected whether or not cable service is used. As a result, the Association argues that it is not subject to the retransmission consent regulations: 1) because it has no subscribers or customers; and 2) the Association's members exercise ultimate control over the operations of the system and, according to the 1992 Cable Act, the building owner or subscriber is not considered a "multichannel video programming distributor." The Association concludes, therefore, that it is not required to obtain retransmission consent from KXAS-TV to retransmit its signal.

4. KXAS-TV argues in reply that the Association's arguments are without merit. It maintains that to accept the Association's position would remove it entirely from the definition of a cable system and thus exempt it from all Commission regulation. KXAS-TV states that it does not believe that it was the Act's intention to exempt an entity, such as the Association, which provides cable service, by whatever means, to over 10,000 individual homes. Instead, the only allowable exemptions apply to apartment buildings and smaller multi-dwelling units which provide signals free of charge at the residents' option. The Association, by its own admission, charges a fee for such services regardless of whether the individual chooses the service or not.

5. We agree with KXAS-TV. Section 76.5(a) of the Commission's Rules, which parallels Section 602(7) of the Communications Act, defines a cable system as "A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to

[1] Las Colinas is a residential and commercial development located in Irving, Texas.

multiple subscribers within a community. . . ." The Association's cable system meets this definition. Indeed, the Commission's records indicate that the Las Colinas Association has registered its system with the Commission pursuant to Section 76.12 of the Commission's Rules, which requires the registration of all cable television systems which meet the above definition. This would appear to indicate that the Association has previously accepted its status as a cable television system under our rules. The fact that the system limits its wiring to the outside of an individual's house, leaving not only the option for service, but the actual in-house wiring, to the individual does not negate the Association's requirement to comply with the Commission's cable television rules and the applicable statutory requirements. Moreover, the fact that the cable service fees are included as part of an overall Association maintenance fee is immaterial because the statutory definition contains no requirement for payment. Further, The Association's reliance on language in the Commission decision implementing Congress' retransmission consent requirement is misplaced. The Commission clearly limited retransmission consent exemption discussed to "MATV facilities or VHF/UHF antennas on individual dwellings ..." [2] This is clearly not the case here. The Commission also has specifically considered and rejected the types of arguments made by the Association in its *First Report and Order in Docket 20561*, 63 FCC 2d 956 (1977). Based on the standard definition criteria, the Association operates a cable television system and as such, is subject to all the applicable statutory and Commission rule requirements, including retransmission consent. Thus, carriage of the signal of station KXAS-TV without its retransmission consent from the station having been obtain is in violation of Section 325 of the Communications Act.

6. Accordingly, the complaint filed on behalf of North Texas Broadcasting Corporation against The Las Colinas Association IS GRANTED. The Las Colinas Association shall, within thirty (30) day of the release days of this order, inform the Commission that it has ceased carriage of the signal of KXAS-TV or received the necessary retransmission consent.

7. This action is taken by the Chief, Cable Service Bureau pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[2] *See Report and Order in Docket 92-259*, 8 FCC Rcd 2965, para.135 (1993).

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 95-46
Washington, D. C. 20554

In the Matter of	)	
	)	
Amendment of Parts 2 and 15 of the	)	
Commission's Rules to Deregulate the	)	
Equipment Authorization Requirements	)	ET Docket No. 95-19
for Digital Devices	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: February 7, 1995 ; Released: February 7, 1995

Comment Date: 75 days from date of publication in the Federal Register
Reply Comment Date: 105 days from date of publication in the Federal Register

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to amend Parts 2 and 15 of the rules to streamline the equipment authorization requirements for personal computers and personal computer peripherals.[1] Specifically, we are proposing to relax the equipment authorization requirements for these devices from FCC certification to a new equipment authorization process based on a manufacturer's or supplier's declaration of compliance. Under this new equipment authorization procedure, a manufacturer or equipment supplier would test a product to ensure compliance with our standards for limiting radio frequency (RF) emissions and would include a statement of compliance with those standards in the literature furnished with the equipment. We are also proposing to permit personal computers to be authorized based on tests and approval of their individual components, without further testing of the completed assembly. These changes would allow manufacturers and suppliers to market new equipment without having to submit an application for equipment authorization and await FCC approval. We anticipate that these proposed rule changes would save industry approximately $250 million annually. They would also stimulate the creation of jobs and competition in the computer industry by relaxing regulations that are particularly burdensome for small

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[1] A personal computer is defined as an electronic computer that is marketed for use in the home, notwithstanding business applications. See Section 15.3(s). A peripheral device is defined as an input/output unit of a system that feeds data into and/or receives data from the central processing unit of a digital device. Examples include keyboards, printers, video monitors and controller cards, sound cards, etc. See Section 15.3(r).

manufacturers and would align the FCC equipment authorization requirements for personal computers with those used in other parts of the world.

BACKGROUND

2. Parts 2 and 15 of the Commission's rules specify regulations and technical standards to control RF interference from personal computers and their associated peripherals to communications services such as AM, FM and TV broadcasting, land mobile services, aeronautical and maritime communications and navigation systems, amateur radio, etc. These standards specify limits on the radiated emissions and power line conducted emissions from personal computers and personal computer peripherals. Personal computers and personal computer peripherals are subject to certification of compliance by the FCC.[2] Certification requires submittal of a written application, test report and fee to the FCC Laboratory. The FCC Laboratory may request a sample device for testing. The certification process currently takes about 35 days, but can take longer if additional information must be submitted to complete or correct the application. The equipment authorization process must be completed before importation and marketing can begin.[3]

3. Parties that perform tests for certification purposes must submit a description of their measurement facilities.[4] This description serves primarily to ensure that the test site used to measure RF emissions will produce accurate results. The requirement does not address the competence of the laboratory to perform the tests because the FCC reviews the technical data submitted with each application for certification. Approximately 500 laboratories have filed test site descriptions. About half of these laboratories are located in the United States and the remainder are located in other countries. Also, while there are a significant number of independent laboratories that test equipment for various manufacturers and suppliers on a contract basis, many manufacturers operate their own laboratories for testing equipment. The Commission publishes a list of laboratories that have filed a test site description and are willing to perform measurements on a contract basis.

DISCUSSION

4. The Commission has worked cooperatively with industry since the 1970's in developing and administering regulations for personal computers. Today, millions of personal computers are in use providing benefits to individuals and increasing the productivity of

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[2] The Commission's equipment authorization procedures are set forth in 47 CFR Sections 2.901, et seq.

[3] See 47 CFR Section 2.801, et seq.

[4] See 47 CFR Section 2.948.

businesses. With industry's support, the Commission's program for controlling interference from computing devices has proven successful and has ensured that these devices do not cause interference to radio services. We recognize that certification for personal computer equipment has now become increasingly burdensome for manufacturers given the rapid pace of personal computer technology development. With product life cycles that are often as short as six months, our 35 day speed-of-service for processing equipment authorization applications can represent a significant portion of the market life for personal computers and peripherals. Delays in the equipment authorization process can cause a manufacturer to lose its competitive advantage.

5. In this regard, we recently have received a number of requests from computer manufacturers, distributors and retailers, test laboratories and other interested parties regarding possible changes to the rules to relax the FCC certification requirements for personal computers and peripherals. These parties have also suggested that we permit authorization of computer systems assembled from components without the need to obtain equipment authorization for every combination of components. Based on the current high rate of compliance and lack of significant interference from personal computers and their peripherals, we now believe it is possible to reduce the regulatory burden on manufacturers without compromising our objective of controlling interference from personal computing equipment. In developing our proposals we have taken into account specific suggestions made by industry. We recognize, however, that many parties have an interest in these rules. It is our intent to solicit as broad a range of comments and alternative suggestions as possible. Our specific proposals are discussed below.

Equipment Authorization Requirements

6. We are proposing to employ a new equipment authorization procedure for personal computers and personal computer peripherals. Specifically, we are proposing to relax the equipment authorization requirements for these devices from FCC certification to a new equipment authorization process based on a manufacturer's or supplier's declaration of compliance. Under this new equipment authorization procedure, a manufacturer or equipment supplier would test a product to ensure compliance with our standards for limiting RF emissions and would include a statement of compliance with those standards in the literature furnished with the equipment. We are proposing that this statement, entitled a "Declaration of Conformity" (DoC), include the following information: 1) identification of the specific product covered by the declaration (e.g., by trade name and model number); 2) a statement that the product complies with Part 15 of the FCC Rules; 3) identification of the compliance test report by date and number; and, 4) identification by name, address and telephone number of the manufacturer, importer or other party located within the United States that is responsible for ensuring compliance. We are proposing that the party that issues the DoC would be the party responsible for ensuring compliance with all applicable FCC requirements and that this declaration must be executed before the subject equipment may be imported or marketed. We are further proposing to require that the responsible party furnish the DoC

and test report to the Commission within 14 days if requested.[5]

7. Under our current rules, personal computers and personal computer peripherals must be labelled with the FCC Identifiers that are associated with their grants of certification.[6] Since we are proposing no longer to require certification of personal computers and their peripherals, there may be no easy way for consumers to look at a specific device and determine that it complies with our testing and authorization requirements. As such, we believe that some sort of compliance labelling may be required. Our rules do require all Part 15 devices to be labelled with a general statement of compliance with the standards.[7] We propose, therefore, that personal computers and their peripherals be required to also display a small logo, similar to the UL logo used by products that comply with standards developed by the Underwriters' Laboratories or the EC logo that indicates compliance with European standards. This logo will indicate compliance with FCC Rules. We invite comments on the specific format for such compliance labelling.[8] We invite comments as to whether this labelling is necessary and whether the costs of this requirement warrant the benefits. We are also proposing to maintain the existing requirement to provide information in the user manual as to the steps to be taken in the event the equipment causes interference.[9]

8. With regard to compliance testing, we believe it is important under this self-certification program to ensure that laboratories can adequately perform the testing required. We note that the National Institute of Standards and Technology (NIST) has developed a "National Voluntary Laboratory Accreditation Program" (NVLAP) to ensure the competence of test laboratories. We believe that the NVLAP could serve as an effective method for

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[5] We note that this proposal is similar to suggestions advanced by computer industry representatives. For example, the Information Technology Industry Council (ITI), formerly the Computer and Business Equipment Manufacturers Association (CBEMA), suggested a similar approach. ITI claims that such an approach would save manufacturers and suppliers of personal computer equipment $250 million annually. See letters dated November 8 and 11, 1994, from the President of CBEMA the to the Chief, Office of Engineering and Technology.

[6] See 47 CFR Sections 2.925 and 2.926.

[7] See 47 CFR 15.19(a)(3).

[8] Recognizing that the North American Free Trade Agreement calls for the general harmonization of technical standards and equipment authorization requirements for all types of products, we also invite comment on whether a North American Class A or Class B label might be more appropriate. While Class B products may be used in any environment, including residential, Class A digital devices incorporates products that are used only in an industrial, commercial or business environment. See 47 CFR Section 15.3(h) and (i).

[9] See 47 CFR Sections 15.19 and 15.105.

laboratories to demonstrate competence to perform FCC compliance testing. Under this program, NIST reviews the qualifications of a laboratory's testing personnel, quality control procedures, record keeping and reporting, etc. and sends recognized experts to observe testing.[10] We also observe that laboratory accreditation is generally required, either implicitly or explicitly, under most foreign product approval procedures. Accordingly, as part of this new DoC process, we are proposing to require that laboratories testing personal computers and personal computer peripherals be NVLAP accredited.[11] We request comments on this proposal. Specific comments are requested on the desirability of requiring NVLAP accreditation of manufacturer's laboratories or permitting alternative methods of accrediting laboratories.[12]

9. We are aware that only about 20 labs are currently accredited by NVLAP for FCC testing of personal computers and peripherals and only one is located outside the United States. We therefore believe a transition period is needed to allow laboratories an opportunity to obtain NVLAP accreditation. Accordingly, we are proposing to maintain the option of obtaining FCC certification for personal computers and peripherals for a period of two years to allow laboratories time to obtain accreditation. Comments are invited as to whether this is an adequate period of time. We are aware that it may be particularly difficult for foreign laboratories to obtain NVLAP accreditation due to the logistics of arranging for the required inspection by experts. However, NIST could negotiate agreements whereby its foreign counterparts perform the necessary accreditation. We plan to work closely with NIST to ensure that the NVLAP program is effective in ensuring the competence of laboratories that perform FCC compliance tests for personal computer equipment.

10. To ensure that personal computers and peripherals continue to comply with our

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[10] Information describing the NVLAP accreditation program is being inserted in the record for this proceeding. NVLAP accreditation is available to demonstrate competence to perform tests in accordance with the measurement procedure for digital devices used by the Commission, namely, American National Standards Institute (ANSI) C63.4-1992, entitled "Methods of Measurement of Radio Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz," published by the Institute of Electrical and Electronics Engineers, Inc. on July 17, 1992, as document number SH15180. See 47 CFR 15.31(a)(6). We understand that NVLAP accreditation typically costs $5000 to $7500 for the initial accreditation with an annual administrative fee of approximately $2500 thereafter.

[11] This aspect of our proposal is consistent with a suggestion submitted by the American Council of Independent Laboratories (ACIL). See letter dated December 21, 1994, from the Chairman, ACIL EMC Subcommittee to the Chief, Sampling and Measurements Branch.

[12] For example, we are aware that the private sector has developed programs to accredit test laboratories, such as that offered by the American Association for Laboratory Accreditation.

emissions standards, we plan to reallocate a portion of our resources that had been used to process equipment certification applications to increased examination and testing of sample equipment on the market. Parties responsible for devices found not to be in compliance would be subject to appropriate enforcement actions.[13]

11. We believe our proposals for relaxing the equipment authorization requirements for personal computing equipment would provide a number of important benefits for manufacturers and suppliers of this equipment and that these benefits would ultimately inure to personal computer users as well. Initially, we observe that our proposed plan would enable manufacturers to introduce equipment to the market more rapidly and to avoid the costs involved in the current certification process. Reducing the time-to-market of computer products would promote competition in the market for these products. As noted by ITI, avoidance of the delays and filing costs associated with the current process also could save the industry many millions of dollars, providing higher rates of return on investment that would both allow manufacturers to focus more resources on further product development efforts and attract new resources to the industry. Our proposals would further protect manufacturers' business interests by eliminating the premature disclosure of new products that occurs in the filing of applications for certification. These advantages for manufacturers can be expected to benefit consumers in the form of lower prices, more features and improved product quality.

12. We also note that our proposal is similar to product approval programs for digital devices employed in other parts of the world. In Europe, for example, manufacturers are permitted to self-declare compliance with radio noise standards for personal computer equipment. There is growing interest in the international harmonization of standards, test methods and product approval procedures to better facilitate trade.[14] We have, in fact, taken

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[13] For example, we could assess monetary forfeitures and require that importation and marketing of noncompliant equipment cease immediately. See 47 CFR Section 2.801 et seq.

[14] For example, the North American Free Trade Agreement (NAFTA) Article 1304-6 calls for each of the parties to adopt, as part of its conformity assessment procedures, provisions necessary to accept the test results from laboratories in the territory of another party for purposes of product approvals. The Asia Pacific Economic Community (APEC) has adopted guidelines promoting the regional harmonization procedures for the certification of telecommunications equipment. These guidelines state that APEC Member Economies should accord mutual recognition of laboratory test data from other members that is performed in accordance with the accepting Economy's standards and technical requirements. (Certain digital devices, such as computer modems, are also telephone terminal equipment.) The APEC guidelines also call for certification procedures to be streamlined, to provide equipment suppliers with a rapid approval process containing the minimum of administrative obstacles. In addition, at the December 1994 Summit of the Americas hosted by the United States, the Organization of American States' Inter-American Telecommunications Commission (CITEL) was tasked with examining ways to promote greater consistency of the authorization processes

actions in the past to harmonize the standards and measurement procedures for personal computer equipment with those accepted internationally.[15] We believe our proposed DoC plan would advance the possibility that U.S. product approvals for personal computers and their associated peripherals may one day be accepted throughout the world. This would potentially provide U.S. manufacturers easier access to foreign markets, thereby creating jobs and enhancing U.S. economic growth.

13. We invite comments on these proposals to deregulate the equipment authorization requirements for personal computers and their associated peripherals and solicit suggestions for alternative approaches. One alternative would be to retain the current certification process but streamline it to reduce the processing time. Another alternative would be to maintain the certification requirement, but permit marketing to begin as soon as the application is filed. Yet another option would be to relax the equipment authorization requirement for personal computers and peripherals from certification to notification or verification. We note that the proposed new equipment authorization process, which is based on a manufacturer's or supplier's declaration is very similar to our current verification procedure.[16] The two principal differences are that manufacturers must include a copy of the Declaration of Conformity with the information furnished to the user and testing laboratories will be required to be accredited by NIST. We invite comment as to whether digital devices that are currently subject to verification should be subject instead to the new equipment authorization process. We also invite comments as to whether it may be feasible to assure compliance with our standards without requiring testing. We also specifically request information as to the impact, including monetary, of these rules on small businesses.

Authorization of Modular Personal Computers

14. The rules currently require that every combination of enclosure, power supply and CPU board that is marketed as a personal computer be tested and receive equipment

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for telecommunications equipment among member countries.

[15] See Report and Order in GEN Docket Nos. 89-116, 89-117, and 89-118, in the matter of procedure for measuring electromagnetic emissions from intentional and unintentional radiators, 8 FCC Rcd 4236 (1993). See also Report and Order in ET Docket 92-152, in the matter of revision of Part 15 of the Rules to harmonize the standards for digital devices with international standards, 8 FCC Rcd 6772 (1993).

[16] Digital devices, other than personal computers and peripherals, are generally subject to verification of compliance with the Commission's technical standards for controlling radio noise. Verification is a self-approval process where the manufacturer tests the device, retains a record of the result, labels the product as compliant and places information in the user instruction manual to provide guidance on how to correct radio interference. See 47 CFR Sections 15.3(k) and 15.101.

authorization prior to marketing.[17] Individual enclosures, power supplies, and CPU boards are considered to be subassemblies that are not subject to testing or equipment authorization requirements until they are assembled into a personal computer. A recent trend in marketing personal computers is for the manufacturer, distributor or retailer to assemble a computer, using modular computer components such as enclosures, power supplies, and CPU boards, in order to meet the specific needs of the customer. This can result in a wide variety of possible computer configurations that each require testing and authorization. As such, our existing rules are very burdensome on industry, particularly for small assemblers who may build only a few of any particular configuration of computer.[18]

15. In response to petitions from the International Business Machines Corporation ("IBM") and ITI, we initiated a proceeding in 1990 to permit the individual authorization of personal computer CPU boards and power supplies.[19] However, there was no industry consensus in response to our proposals as to how modular personal computer components, and personal computers constructed from these components, should be regulated by the Commission. Indeed, it appears that some of the proposals in that proceeding would have increased the complexity of our regulations, requiring more testing and grants of equipment authorization than under the current rules. The record in that proceeding is now stale due to several changes that have occurred. For example, there are now multiple vendors of microprocessors that can easily be interchanged in a given CPU board, potentially affecting the levels of radio noise that may be generated. Further, as discussed previously, we are now proposing to relax the equipment authorization requirements for personal computers and peripheral devices to a supplier's Declaration of Conformity, something that wasn't proposed previously. Accordingly, we intend to terminate the earlier proceeding in GEN Docket No. 90-413 and are initiating this new proceeding with revised, simplified proposals.

16. We believe that it is important for our rules to recognize the changes that have occurred in the design and marketing of personal computers. Accordingly, in addition to our proposal to replace the current certification requirement with a requirement for a Declaration of Conformity, we are proposing further changes that will specifically provide for modular digital devices. These changes should result in decreased regulatory burden, reduced time to market, greater design flexibility and lower costs for manufacturers and consumers.

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[17] See 47 CFR Section 15.101(c) and (e).

[18] In some cases, the cost of obtaining a grant of certification for a personal computer, including testing, can exceed $5,000.00. This cost can be prohibitive, especially for a system assembler, such as a retailer, that assembles and markets computers in small quantities.

[19] See, Petition for Reconsideration filed by IBM on May 26, 1989, and Petition for Limited Reconsideration filed by CBEMA on May 26, 1989, in response to the First Report and Order, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989). See, also, Notice of Proposed Rule Making, GEN Docket No. 90-413, 5 FCC Rcd 5652 (1990), and Further Notice of Proposed Rule Making, GEN Docket No. 90-413, 7 FCC Rcd 4866 (1992).

17. We propose to require that all CPU boards, power supplies, and enclosures designed for use in personal computers and marketed to the public be authorized to demonstrate compliance with the technical standards contained in Part 15 of our rules.[20] A CPU board would be defined as a circuit board that contains a microprocessor, or frequency determining circuitry for the microprocessor, the primary function of which is to execute user-provided programming, but not including: (1) a circuit board that contains only a microprocessor intended to operate under the primary control or instruction of a microprocessor external to such a circuit board; or, (2) a circuit board that is a dedicated controller for a storage or input/output device.[21]

18. We also propose to allow any party to integrate personal computer systems using these authorized components or to interchange these components in existing personal computer systems without the need to retest the resulting system, provided the assembly instructions provided with the components are followed.[22] The assembler will be required to issue a new Declaration of Conformity indicating the basis on which compliance was ensured, e.g., only authorized components were used in the assembly or authorized components were installed in an authorized system. This Declaration of Conformity must specify the identification of each product used in the computer, a statement that the computer complies with the Part 15 of the FCC Rules, identification of the compliance reports for each product used in the computer by date and number, and identification by name, address and telephone number of the assembler who becomes responsible for ensuring that the resulting system complies with the standards.[23] We solicit views on these general proposals.

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[20] The reference to authorization refers to certification, verification or a Declaration of Conformity, depending on what is finally adopted in this proceeding. We intend to apply the same level of authorization to components of a computer as what is finally adopted for assembled computers.

[21] This is the definition that was developed under GEN Docket 90-413. It is intended to exclude products such as I/O cards, e.g., video cards, printer interface cards, and disk drive controller cards.

[22] We propose to continue to permit personal computers to be authorized as a system, based on the specific combination of CPU board, power supply and enclosure used in their construction, without having to obtain a separate authorization for each internal component. Assemblers or manufacturers of these computers could separately authorize the individual components at a later date if so desired.

[23] As with computers authorized as complete systems, computers assembled from authorized components must comply with the existing labelling and user information requirements that apply to verified equipment. See 47 CFR Sections 15.19, 15.21, 15.27 and 15.105. We will not permit the use of paper, stick-on labels on these products. Such labels generally do not adhere well to printed circuit boards and would not be expected to last the lifetime of the equipment, as required under the rules.

19. The current rules require that personal computer equipment be tested to show compliance with technical standards that limit the level of RF energy that may be radiated from the device and conducted onto the AC power lines.[24] The radiated limits are intended to protect communications above 30 MHz and the conducted limits protect communications below 30 MHz. The ability of a personal computer system to comply with the technical standards depends upon a complex interaction of the CPU board, power supply, enclosure and other subassemblies used within the system. The shielding, grounding and filtering techniques used in the design of a personal computer system can be critical in determining whether the system complies with FCC standards. This poses a particularly difficult challenge for development of appropriate measurement configurations for determining whether CPU boards, power supplies and enclosures meet our standards. For example, testing CPU boards in a single typical computer system configuration, as is currently the practice for testing personal computers, may not adequately ensure compliance with our standards. We are cognizant that no measurement procedure can provide complete assurance of compliance for all possible combinations of personal computer components. It is rather our intent that the measurement procedures will ensure compliance under most conditions. The small risk that certain combinations of components might not comply with our standards simply does not warrant extensive, burdensome measurement procedures. Nor do we believe that justification exists for creating burdensome restrictions as to what products can be combined without additional testing.

20. In our earlier proceeding on modular computers, we proposed a novel approach for testing the levels of emissions from CPU boards.[25] We proposed that the CPU board be tested twice. In the first test, the CPU board would be connected to a power supply with the oscillator circuit for the microprocessor operating with the output coupled to the microprocessor circuit, as would occur under normal operation.[26] No peripheral devices would be connected during this first test, and only radiated emissions would be measured. Further, under this first test, we would permit the radiated emissions to exceed the limits specified in our rules by a specified amount, e.g., 6 dB. The second test of the CPU board would take place with the CPU board installed in a representative enclosure, with a representative power supply, and configured in the manner currently specified under our rules.[27] This latter test must demonstrate compliance with the appropriate standards for both radiated and conducted emissions. We continue to believe that this overall approach has merit. However, we invite comment on this proposal and request alternative suggestions. We

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[24] See 47 CFR Sections 15.107 and 15.109.

[25] See Further Notice of Proposed Rule Making, op. cit., at para. 19-20.

[26] If the oscillator and microprocessor boards are contained on separate circuit boards, both boards, typical of the combination that would normally be employed, would be used in the tests.

[27] See 47 CFR Section 15.31(a).

also invite comment as to how to deal with the fact that a CPU board may be capable of accepting microprocessors from multiple manufacturers.

21. We propose to permit power supplies to be authorized based on a single test with the power supply installed in a typical configuration, as is currently done under the rules. We have found that the design of the computer power supply generally determines the ability of the computer to comply with our standards for limiting emissions conducted onto the AC power lines. In this case, interaction between the various components within the computer should have little impact on the ability of the power supply to demonstrate compliance with the standards.

22. We have not heretofore proposed standards or measurement procedures for personal computer enclosures used with modular computers. However, commenters in our earlier proceeding on modular computers were nearly unanimous in stating that authorization for enclosures is critical to the successful control of radiated emissions. This is once again a complex problem because an enclosure when tested with a CPU board that produces little radio noise may be considered "compliant" and yet may not be "compliant" when tested with a CPU board that is noisy. Further, an enclosure that is satisfactory for shielding the frequencies of emissions produced by a 33 MHz "486" processor, may not be adequate for shielding the emissions produced by a 90 MHz Pentium processor. We believe a pragmatic approach must be taken. We believe that the CPU board and other components used for tests on the enclosure should produce emissions within a few dB of the emissions limits without the enclosure. The enclosure should be shown to provide 6 dB of shielding effectiveness across the spectrum from 30 MHz to 1000 MHz. The DoC for the enclosure should specify the particular types of CPU boards for which it is authorized (e.g., for use with "486DX2" CPU boards). We invite comment on this approach and request alternative recommendations.

23. In general, we believe that manufacturers should design modular personal computer systems such that there is no need for special add-on parts or accessories, such as ferrite beads, to be provided with the CPU board, power supply or enclosure in order to achieve compliance with our emission limits. However, the existing rules already allow the use of special accessories for other devices and we are proposing to apply the same requirements to CPU boards and power supplies.[28] Any special steps required to ensure compliance must be explained in the installation instructions. We propose to prohibit authorization of CPU boards or internal power supplies that require complex electrical changes to the host system, such as by soldering parts or altering circuitry.

24. In addition to describing any special accessories, the instruction manual must also specify all of the installation procedures that must be followed to ensure compliance with the

[28] See 47 CFR Section 15.27.

standards.[29] For example, the installation instructions shall address, where needed, the use of shielded connecting cables, the number and location of ground connections, the type of enclosure to be employed, and the addition of any needed components.

25. We propose to continue our policy of permitting non-authorized digital devices, including CPU boards and power supplies, to be sold to other manufacturers for further fabrication.[30] In such cases, the final manufacturer would be responsible for testing and authorizing the product. However, computer CPU boards, internal power supplies and enclosures that are marketed to the general public must be authorized prior to marketing. Similarly, we propose to amend our importation rules to require that, when non-authorized computer CPU boards, power supplies or enclosures are imported, the consignee must be the manufacturer who will assemble and be responsible for testing and authorizing the computer into which these components are to be installed.[31] Comments are requested on these proposals.

PROCEDURAL MATTERS

26. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

27. Initial Regulatory Flexibility Analysis. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq (1981).

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[29] Other statements may also be needed in the instruction manual. See, for example, 47 CFR Sections 15.21, 15.27, and 15.105.

[30] We recognize that manufacturers of CPU boards, power supplies, and enclosures may need to provide their products to computer system manufacturers for testing, evaluation or product development purposes before authorization is obtained. We propose to allow such marketing in limited quantities.

[31] See 47 CFR Sections 2.1201 et seq.

28. Comment Dates. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comment on or before [insert date 75 days from date of publication in the Federal Register] and reply comments on or before [insert date 105 days from date of publication in the Federal Register]. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

29. The proposed action is authorized under Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307.

30. For further information regarding this Notice of Proposed Rule Making, contact John Reed, Office of Engineering and Technology, (202) 653-6288.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

This rule making proceeding is initiated to obtain comment regarding whether and how the Commission should regulate computers, peripheral devices to computers and subassemblies to computers.

Objectives

The Commission seeks to determine the standards, test procedures, and equipment authorization requirements that should be applied to computers as well as to CPU boards, power supplies, and enclosures used in personal computers in order: 1) to reduce regulatory burdens on computer manufacturers; 2) to remove impediments to flexible system design and construction techniques for computers; and, 3) to reduce the potential for interference to radio services by improving our ability to ensure that personal computers comply with our standards.

Legal Basis

The proposed action is authorized under Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307.

Reporting, Recordkeeping and Other Compliance Requirements

CPU boards, power supplies, and enclosures designed for use in computers are proposed to be included under our standards and equipment authorization requirements. These components, which were not previously subject to our rules, will be included under an equipment authorization procedure similar to our verification procedure with the addition of a Declaration of Conformity that would be included with each product marketed. In addition, we propose to permit any party to assemble computers from authorized CPU boards, power supplies, and enclosures without further testing provided the instructions accompanying the components are followed during assembly. Computers assembled in this fashion would also be accompanied by a Declaration of Conformity. Alternatively, the computer may be assembled using unauthorized components provided the resulting system is tested and accompanied by a Declaration of Conformity. While the measurement data, where required, must be retained by the responsible party, there is no requirement to file an application with, and obtain authorization from, the Commission prior to marketing or importation. Accordingly, we expect a significant decrease in the overall recordkeeping requirements.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None

Description, Potential Impact and Number of Small Entities Involved

The actions proposed in this proceeding will result in a significant decrease in the amount of testing and Commission authorization of computer systems. Currently, every combination of components used to make a basic computer system must be tested and authorized prior to marketing or importation. This is extremely burdensome, especially on small manufacturers. Under the proposal, as long as authorized components are used to assemble the computers no additional testing or Commission authorization would be required. However, there will be some impact to the entities that manufacture computer CPU boards, power supplies and enclosures. We estimate there are 50-75 manufacturers of CPU boards and a similar number of manufacturers of power supplies. No estimate is available on the potential number of manufacturers of enclosures. Even with this additional impact to the manufacturers of computer CPU boards, power supplies and enclosures, the overall workload will decrease.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with Stated Objectives

None.

FCC 95-48

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services	)	CC Docket No. 95-20

NOTICE OF PROPOSED RULEMAKING

Adopted: February 7, 1995 **Released: February 21, 1995**

Comment Date: April 7, 1995
Reply Comment Date: April 28, 1995

By the Commission:

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I. INTRODUCTION

1. In the Computer III proceeding, the Commission adopted major changes to the rules governing the Bell Operating Companies' (BOCs') participation in the enhanced services market.[1] In particular, the Commission determined that the requirement that the BOCs offer enhanced services through structurally separate subsidiaries should be replaced with a set of nonstructural safeguards.[2] Following a remand from the United States Court of

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[1] "Enhanced services" use the telephone network to deliver services that provide more than a basic voice transmission offering. They are contrasted with "basic services," such as "plain old telephone service" (POTS), which are regulated as tariffed services under Title II of the Communications Act. See 47 C.F.R. § 64.702(a); infra para. 3.

[2] Under the structural separation requirements, BOCs were required to establish separate subsidiary companies, hire separate personnel, and use separate computer equipment and other facilities for their enhanced services. After Computer III, BOCs are still permitted to offer their enhanced services through subsidiary

Appeals for the Ninth Circuit, the Commission in 1991 issued the BOC Safeguards Order, which adopted additional nonstructural safeguards and articulated the requirements for removing all structural separation requirements. On October 18, 1994, the Ninth Circuit decided California v. FCC[3] (California III), which remanded the BOC Safeguards Order. The California III decision held that we had not sufficiently explained our conclusion that totally removing structural separation requirements was in the public interest, given that our Open Network Architecture (ONA) requirements no longer called for "fundamental unbundling" of the BOC networks.

2. In response to the Ninth Circuit's concerns, we review the various nonstructural safeguards against BOC access discrimination[4] that are currently in place. The issue remanded by the court is whether we should totally lift structural separation requirements, as applied to BOC provision of enhanced services, given the current state of network unbundling under ONA.[5] We also solicit comments, broadly, on whether structural separation should be reimposed for some or all BOC enhanced services.[6]

II. BACKGROUND

3. In 1980, the Commission issued Computer II, which adopted a regulatory scheme with two categories of communications

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companies, but those subsidiaries are able to share personnel, facilities, and marketing resources with the parent companies.

[3] 39 F.3d 919 (9th Cir. 1994).

[4] "Access discrimination" occurs when BOCs provide competing enhanced service providers (ESPs) with access to network services inferior to that provided to the BOCs' own enhanced services, or when BOCs otherwise refuse, as a means of exercising market power, to provide network services desired by ESPs.

[5] As used herein, totally lifting structural separation requirements, or "full structural relief," means removing the requirement that BOCs receive approval of service-specific Comparably Efficient Interconnection (CEI) plans prior to offering any new enhanced service. Under full structural relief, BOCs are permitted to offer all enhanced services on a structurally integrated basis, so long as they comply with ONA requirements. A detailed description of the two stages of Computer III structural relief and the various ONA requirements is provided in Sections (IV)(B)(1)-(2), below.

[6] For a further discussion of the scope of the remand proceedings, see infra Section III.

services: basic and enhanced. Basic services, such as "plain old telephone service" (POTS), are regulated as tariffed services under Title II of the Communications Act. Enhanced services use the existing telephone network to deliver services other than basic transmission, such as voice mail, E-Mail, voice store-and-forward, fax store-and-forward, data processing, and gateways to on-line databases.

4. In Computer II, the Commission concluded that enhanced services should not be regulated under Title II of the Communications Act.[7] The Commission established rules to govern the provision of enhanced services, including a requirement that the then-integrated Bell System establish separate subsidiaries for the provision of enhanced services.[8] Following the divestiture of AT&T in 1984,[9] the Commission extended the structural separation requirements of Computer II to the BOCs.[10]

5. In Computer III, the Commission reexamined the state of the telecommunications marketplace and the effects of structural separation during the six years since Computer II, and determined

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[7] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384, 428-40, paras. 114-18 (1980) (Final Decision), recon., 84 FCC 2d 50 (1981) (Reconsideration Order), further recon., 88 FCC 2d 512 (1981) (Further Reconsideration Order), affirmed sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[8] Final Decision, 77 FCC 2d at 475-86, paras. 233-60; Reconsideration Order, 84 FCC 2d at 75-86, paras. 72-105; 47 C.F.R. § 64.702.

[9] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), affirmed sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[10] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No 83-115, Report and Order, 95 FCC 2d 1117, 1120, para. 3 (1984) (BOC Separation Order), affirmed sub nom. Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (7th Cir. 1984), affirmed on recon., FCC 84-252, 49 Fed. Reg. 26056 (1984) (BOC Separation Reconsideration Order), affirmed sub nom. North American Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985).

that structural separation was no longer in the public interest.[11] The Commission concluded that nonstructural safeguards could protect competing enhanced service providers (ESPs) from anticompetitive activity by the BOCs while avoiding the inefficiencies associated with structural separation. The Commission therefore permitted the BOCs to provide enhanced services on an integrated basis with their basic service pursuant to Comparably Efficient Interconnection (CEI) requirements.[12] In the first stage of implementing Computer III, BOCs had to obtain, prior to offering any new enhanced services, FCC approval of service-specific CEI plans. In these plans, the BOCs were required to explain how they would offer to ESPs all the underlying basic services the BOCs used for their own enhanced services. BOCs were obligated under CEI to offer these services to ESPs subject to a series of "equal access" parameters, including requirements that the services be offered at the same tariffed rates the BOCs themselves paid, and that the services offered to ESPs have the same technical characteristics and interface functionality as the services used by the BOCs.[13] The approved "CEI plans" did not require, however, that BOCs provide other network services that ESPs might find useful if the BOCs themselves did not use those network services. During the second stage of implementing Computer III, the BOCs were required to develop and implement ONA plans that detailed all network services they would provide to competitive

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[11] Amendment of Section 64.702 of the Commission's Rules and Regulations, (Computer III), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (Phase I Order), recon., 2 FCC Rcd 3035 (1987) (Phase I Reconsideration Order), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration), Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), further recon., 4 FCC Rcd 5927 (1988) (Phase II Further Reconsideration Order), Phase II Order vacated, California v. FCC, 905 F.2d 1217; Computer III Remand Proceedings, 5 FCC Rcd 7719 (1990) (ONA Remand Order), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (BOC Safeguards Order); BOC Safeguards Order vacated in part, California v. FCC, 39 F.3d 919.

[12] These CEI requirements, and the plans BOCs have filed to show compliance with them, are described in Section IV(B)(1), below.

[13] See Phase I Order, 104 FCC 2d at 1036, para. 147.

ESPs and described how they would comply with certain nonstructural safeguards. The Commission required the BOCs to comply with various other nondiscrimination safeguards, including requirements regarding network disclosure, customer proprietary network information (CPNI) rules, and quality, installation, and maintenance reporting requirements.[14]

6. In 1990, the Court of Appeals for the Ninth Circuit in California I vacated three orders in the Computer III proceeding.[15] The court concluded that the Commission had not adequately justified the decision to rely on cost accounting safeguards as protection against cross-subsidization of enhanced services by the BOCs.[16] In order to avoid disruption in service while it conducted remand proceedings, the Commission granted an interim waiver to allow the BOCs to continue providing enhanced services pursuant to previously-approved CEI plans pending completion of the rulemaking proceeding that culminated in the BOC Safeguards Order.[17] In that order, the Commission reevaluated the costs and benefits of lifting structural separation, and concluded that, with strengthened cost accounting requirements, the removal of structural separation requirements served the public interest.[18] The Commission determined that its experience in the decade since the Computer II Final Decision demonstrated that structural separation inhibited the deployment of enhanced services, and that the safeguards it adopted in the BOC Safeguards Order would ensure a fair competitive environment.

7. Among the nonstructural safeguards required in Computer III was ONA, which requires BOCs to unbundle elements of their networks and allow ESPs to purchase specific services that are useful for their enhanced services. ONA goes beyond the CEI requirements of the Computer III Phase I Order, which mandated that BOCs provide competitive ESPs with "equal access" interconnections to basic network services at the same tariffed rates that the BOCs

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[14] See infra § (IV)(B)(3).

[15] California v. FCC, 905 F.2d 1217.

[16] Id. at 1232-39.

[17] Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, 5 FCC Rcd 4714 (1990). See also Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Notice of Proposed Rulemaking, CC Docket No. 90-623, 6 FCC Rcd 174, 183-84, paras. 56-66 (1990).

[18] BOC Safeguards Order, 6 FCC Rcd at 7617-25, paras. 90-109.

themselves paid.[19] The Commission announced in the Phase I Order that it was prepared to lift Computer II structural separation and service-specific CEI filing requirements after the BOCs submitted ONA plans that met a defined set of criteria.[20] During the period from 1988 to 1992, the Commission, after requiring multiple rounds of amendments, approved BOC ONA plans that described the unbundled basic services each BOC proposed to provide as ONA services and the terms under which they would be offered.[21] During the two-year period from 1992 to 1993, the Common Carrier Bureau approved the lifting of structural separation for individual BOCs upon their showing that their initial ONA plans complied with the requirements of the BOC Safeguards Order,[22] and these decisions were later

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[19] Phase I Order, 104 FCC 2d at 1034-66, paras. 142-218.

[20] Id. at 1064, 1067-68, paras. 213, 220-21. The unbundling standard for the BOCs required that: (1) BOCs obtain unbundled network services pursuant to tariffed terms, conditions, and rates available to all ESPs; (2) BOCs provide an initial set of basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible; (3) ESPs participate in developing the initial set of network services; (4) BOCs select the set of network services based on the expected market demand for such elements, their utility as perceived by enhanced service competitors, and the technical and costing feasibility of such unbundling; and (5) BOCs comply with CEI requirements in providing basic network services to affiliated and unaffiliated ESPs.

[21] Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988) (BOC ONA Order), recon., 5 FCC Rcd 3084 (1990) (BOC ONA Reconsideration Order); 5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order), erratum, 5 FCC Rcd 4045, pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 97 (1993) (BOC ONA Amendment Reconsideration Order); 6 FCC Rcd 7646 (1991) (BOC ONA Further Amendment Order); 8 FCC Rcd 2606 (1993) (BOC ONA Second Further Amendment Order), pet. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993). In April 1994, the Commission decided to apply the Computer III and ONA requirements to GTE Corporation. Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92-256, 9 FCC Rcd 4922 (1994).

[22] For each of the BOCs, the Bureau either determined that all the services described in the ONA plans were being offered, or granted waivers for services the BOCs were not offering, usually because of lack of demand. See Bell Atlantic's Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and

affirmed by the Commission.[23] Pending approval of the BOC ONA plans and removal of structural separations requirements, BOCs could provide individual enhanced services on an integrated basis only after receiving approval of service-specific CEI plans.[24]

8. After California I, and after the issuance of the BOC Safeguards Order on remand, the Ninth Circuit in California II upheld the orders approving BOC ONA plans.[25] The California II court concluded that the Commission had scaled back its vision of ONA since Computer III, but that the issue of whether the lifting of structural separation was still justified was not properly before it.[26]

88-2, Phase I, 7 FCC Rcd 3877 (1992) (Bell Atlantic Order); Southwestern Bell Telephone Company Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 7294 (1992) (SWBT Order); US West Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623, and 88-2, Phase I, 7 FCC Rcd 3639 (1992) (US West Order); Ameritech Operating Companies Notice and Petition for Removal of the Structural Separation Requirement, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 4104 (1992) (Ameritech Order); New York Telephone Company and New England Telephone Company Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 8633 (1992) (NYNEX Order); Pacific Bell and Nevada Bell Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 8 FCC Rcd 3982 (1993) (Pacific Order); BellSouth Corporation Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 8 FCC Rcd 4864 (1993) (BellSouth Order).

[23] Petition for Removal of the Structural Separation Requirements and Waiver of Certain State Tariffing Requirements, 9 FCC Rcd 3053 (1994) (Structural Relief Order), petition for review pending sub nom. MCI v. FCC, No. 94-1597 (D.C. Cir. filed August 29, 1994).

[24] Phase I Order, 104 FCC 2d at 1059, para. 201.

[25] California v. FCC, 4 F.3d 1505.

[26] Id. at 1511-13.

9. In California III, the Court of Appeals for the Ninth Circuit partially vacated the BOC Safeguards Order.[27] The court held that the Commission had "responded to our concerns" expressed in California I about improper cross-subsidization, and that the Commission had "demonstrated that the BOCs' incentive and ability to cross-subsidize will be significantly reduced" under the Commission's regime of nonstructural safeguards.[28] The decision also upheld the preemption elements of the BOC Safeguards Order.[29] As discussed in greater detail below, however, the court observed that the BOC Safeguards Order permitted the BOCs to move beyond the CEI plan regime to a framework of full structural integration based on the approved BOC ONA plans. The court reaffirmed the conclusion of California II that the Commission had retreated from its commitment to require "fundamental unbundling" of BOC networks as a component of ONA, and noted that the issue of how this policy shift affected structural relief was now squarely before it. The court observed that parties had argued that ONA, as implemented, failed to prevent BOCs from engaging in access discrimination against competing ESPs.[30] As the Commission had not explained why its shift away from "fundamental unbundling" did not undermine the decision to rely on ONA safeguards under full structural relief, the California III court concluded that the Commission's cost benefit analysis was flawed. California III therefore vacated the Commission's decision in the BOC Safeguards Order to move from a service-specific CEI plan regime to full structural relief.

10. On November 14, 1994, the BOCs filed a joint petition (Interim Waiver Petition) requesting an interim waiver to permit them to continue offering enhanced services pursuant to their approved ONA plans.[31] The BOCs also requested an interim waiver to continue unseparated research and development, and to offer on an integrated basis new enhanced services associated with video dialtone. On January 11, 1995, the Common Carrier Bureau

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[27] California v. FCC, 39 F.3d 919.

[28] Id. at 926.

[29] Id. at 931-33.

[30] Id. at 929-30. For a definition of "access discrimination," see supra note 4.

[31] Joint Contingency Petition for Interim Waiver of the Computer II Rules (Nov. 14, 1994) (Interim Waiver Petition)

granted the BOCs a limited interim waiver (Interim Waiver Order).[32] The Bureau concluded that, because California III generally returned our regulation of BOC enhanced services to a CEI plan regime, waivers would only be necessary for new enhanced services or market trials, and for those existing services and market trials that were not covered by previously-approved CEI plans. The Interim Waiver Order allows the BOCs to continue to offer existing enhanced services pursuant to their ONA plans, so long as they file CEI plans within sixty days. BOCs are also permitted to offer new enhanced services after filing and receiving FCC approval of service-specific CEI plans. The Bureau declined to treat video-dialtone-related enhanced services differently from other new enhanced services. The Interim Waiver Order specifies similar requirements for BOCs to continue existing market trials, and to begin new market trials for enhanced services.

III. ISSUES ON REMAND

11. The partial vacation of the BOC Safeguards Order generally reinstates the Computer III service-by-service CEI plan regime. BOCs also must still comply with the requirements of their approved ONA plans, as ONA requirements are independent of structural relief.[33] The California III court acknowledged that as an interim measure until ONA was implemented, CEI plans "ensured that enhanced service competitors were provided with interconnections to the BOCs' own networks that were substantially equivalent to the interconnections that the BOCs provided for their own enhanced services."[34] California III focused, however, on the decision to move from the CEI plan regime to full structural relief under ONA, and specifically on the risk of access discrimination under the current level of BOC network unbundling.

12. The California III court found the BOC Safeguards Order arbitrary and capricious insofar as it completely lifted structural separation requirements without explaining how an ONA regime without "fundamental unbundling" would provide an adequate safeguard against access discrimination by the BOCs. The court stated that "the FCC never explains why it now authorizes lifting structural separation when it recognizes that its assumptions in Computer III regarding ONA have not proven correct, and that

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[32] Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, Memorandum Opinion and Order, DA 95-36 (Common Carrier Bureau, January 11, 1995) (Interim Waiver Order).

[33] ONA Remand Order, 5 FCC Rcd 7719 (1990).

[34] California III, 39 F.3d at 927.

fundamental unbundling is not attainable at this time."[35] California III thus requires us to reexamine the public interest benefits and the risk of access discrimination that result from totally lifting structural separation requirements, given the current level of network unbundling. Accordingly, we are here seeking comment on whether the nonstructural access discrimination safeguards spelled out below -- including the current level of ONA network unbundling -- provide sufficient protection, given the benefits of integrated BOC provision of enhanced services, to lift the service-specific CEI plan filing requirements, as contemplated in Computer III and the BOC Safeguards Order.

13. Beyond the specific issues we are required to address by the California III remand, several parties have raised broader questions about whether our decision to rely on nonstructural safeguards serves the public interest. We therefore solicit comment on whether structural separation should be reimposed for some or all BOC enhanced services. Parties are asked to provide evidence as to whether the current Computer III regime of nonstructural safeguards or a Computer II-like framework of structural separation with the possibility of waivers permitting the BOCs to offer specific enhanced services on an integrated basis better serves the public interest. We also seek comment on whether such waivers, if granted, should be conditioned upon compliance with specific safeguards, and which safeguards would be appropriate.

IV. DISCUSSION

14. In response to the California III decision, we review the various nonstructural safeguards that govern BOC provision of enhanced services, including the network unbundling currently required under ONA. We describe how these safeguards were designed to protect against access discrimination by the BOCs, and we solicit comment on their effectiveness. We then consider the broader question of the costs and benefits of relying on nonstructural safeguards as opposed to structural separation for BOC enhanced services, and we ask parties to comment as to what they believe would be the most effective regulatory framework.

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[35] Id. at 930.

A. The Evolutionary ONA Model[36]

15. The concept of ONA has evolved since the initial stages of the Computer III proceeding. In the Computer III Phase I Order we declined to adopt any specific network architecture proposals and instead specified certain standards that carriers' ONA plans must meet.[37] We required BOCs to file initial ONA plans presenting a set of "unbundled basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible."[38] We stated that by adopting general requirements we wished to encourage the most efficient interconnection arrangements possible consistent with our regulatory goals.[39] We noted that although we wanted the BOCs to provide unbundled service elements, we were well aware of inefficiencies that might result from "unnecessarily unbundled or splintered services,"[40] and we acknowledged that this unbundling could only occur to the degree it was "technologically feasible." In the Computer III Phase I Reconsideration Order, we discussed the fact that ONA would be an evolutionary process and that we would allow structural relief for the BOCs once they implemented the initial ONA services in their ONA plans and implemented other nonstructural safeguards.[41] In the BOC ONA Order that reviewed the initial BOC ONA plans for compliance with the Computer III Phase I Order requirements, the Commission generally approved the use of the "common ONA model" that described unbundled services BOCs would

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[36] In describing the evolution of our ONA requirements as a background for this discussion, we do not challenge the Ninth Circuit's holding that our orders implementing ONA "constituted a retreat from the original premise of Computer III." California III, 39 F.3d at 928. Although we do not agree with that holding, our premise in this remand proceeding is that we have departed from the ONA requirements that the Ninth Circuit perceived in California II. We intend in this proceeding to conduct the cost-benefit analysis that the California III court required. See California III, 39 F.3d at 930, 933.

[37] Phase I Order, 104 FCC 2d at 1064, para. 213. See supra note 20 for a list of the specific standards that the Commission established.

[38] Phase I Order, 104 FCC 2d at 1065, para. 216.

[39] Id.

[40] Id. at 1065, para. 217.

[41] Phase I Reconsideration Order, 2 FCC Rcd at 3055, para. 143.

provide to competing ESPs.[42] At that time, we concluded that we would not require "the kind of fundamental unbundling that would allow ESPs to connect their own trunks or loops to BOC switching facilities."[43]

16. After the BOCs filed their initial ONA plans, the Commission received extensive public comment on the sufficiency of the underlying ONA model used by the BOCs.[44] The Commission adopted additional safeguards, and required the BOCs to amend their initial ONA plans in four rulemaking proceedings between 1988 and 1991, before deciding to lift structural separation.[45] At the end of this process, the Commission approved the initial BOC ONA plans.

B. Access Discrimination Safeguards Under the Approved Open Network Architecture Plans

17. As described in the orders approving the BOC ONA plans, ONA exists to promote a fair competitive marketplace for the provision of enhanced services. ONA incorporates and subsumes CEI "equal access" requirements, mandates further unbundling of network service elements after the lifting of structural separation, and provides for several other safeguards. We now review the safeguards implemented within the current ONA framework in order to detect and deter discriminatory conduct by the BOCs. We ask parties to comment on whether these safeguards are adequate to serve their intended purpose. In their comments, parties are

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[42] BOC ONA Order, 4 FCC Rcd at 13, para. 18. Under the common ONA model, ESPs obtain access to various unbundled ONA services, termed Basic Service Elements (BSEs), through access links described as Basic Serving Arrangements (BSAs). Other ONA elements include Complementary Network Services (CNSs), which are unbundled basic service features that an end user may obtain from BOCs in order to receive or use enhanced services, and Ancillary Network Services (ANSs), which are non-Title II services, such as billing and collection, that may be useful to ESPs. See BOC ONA Amendment Order, 5 FCC Rcd at 3104.

[43] BOC ONA Order, 4 FCC Rcd at 13, para. 18. BOCs are now required to allow third parties, including ESPs, to interconnect their trunks to BOC switches as a result of the Commission's Expanded Interconnection proceeding. See infra para. 30.

[44] BOC ONA Order, 4 FCC Rcd at 35-42, paras. 56-72.

[45] See supra note 21; BOC ONA Order, 4 FCC Rcd 1 (1988); BOC ONA Reconsideration Order, 5 FCC Rcd 3084 (1990); BOC ONA Amendment Order, 5 FCC Rcd 3103 (1990); BOC ONA Further Amendment Order, 6 FCC Rcd 7646 (1991).

encouraged to address their actual experience under these rules.

1. Comparably Efficient Interconnection

18. Since Computer III, the BOCs have been permitted to provide particular enhanced services on an integrated basis pursuant to approved service-specific CEI plans.[46] BOC CEI plans detailed how the BOCs proposed to define and comply with the CEI "equal access" parameters for specific enhanced services. Those CEI parameters include: interface functionality; unbundling of basic services; resale; technical characteristics; installation and maintenance reporting; end user access; availability as of the date the BOC offers its own enhanced services to the public; minimization of transport costs; and availability to all interested ESPs. Under CEI, the BOCs must offer ESPs interconnection to their networks at the same tariffed rates that the BOCs themselves pay.[47] CEI also requires the BOCs to provide ESPs with access to all network service elements that the BOCs need to offer their own enhanced services.[48] CEI therefore is intended to prevent the BOCs from providing competing ESPs network connections inferior to those that the BOCs themselves rely on.[49] After the implementation of ONA and the removal of structural separation requirements, the BOCs still have to offer network services to competing ESPs on a CEI "equal access" basis even though they are no longer obligated to file CEI plans for each new enhanced service they wish to offer. In the Computer III Phase I Order, the Commission determined that the equal access standard of CEI "will increase the public welfare

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[46] In Computer III, the Commission stated that the "basic service functions utilized by a carrier-provided enhanced service [must] be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics, such as installation and maintenance times, equal to those provided to the carrier's enhanced services." Phase I Order, 104 FCC Rcd at 1036, para. 147. The Commission also indicated that it did not expect exact equality in access offered to ESPs under CEI, but that variations in each of the CEI parameters of the basic services offered to competing enhanced services providers should be no greater than those of the basic services used by the carrier in conjunction with its enhanced services offering. Id. at 1036, para. 147 & n.210.

[47] Id. at 1065-66, paras. 147, 214.

[48] Id. at 1064, paras. 214-15.

[49] Id. at 1034-58, paras. 142-200.

by maximizing the availability of enhanced services to the public."[50] The Commission also concluded that CEI would deter access discrimination by the BOCs.

2. Network Unbundling Under ONA

a. Network Services Available to ESPs

19. In Computer III, the Commission required the BOCs, through their ONA plans, to provide network services to competing ESPs based on selection criteria that reflect, among other things, the variation in BOC equipment, cost, and services requested by ESPs in the BOCs' geographic service area. According to BOC ONA reports, ESPs can now select from the over 150 ONA network services provided by one or more BOCs to fashion specific enhanced services to provide to customers. These services are available to competing ESPs through nondiscriminatory intrastate and interstate tariffs. For example, in providing a voice messaging service, US West uses thirteen separate ONA services.[51] US West makes all of these network services available to ESPs on a CEI "equal access" basis. BOCs report that in providing BOC enhanced services they currently use few of the Basic Service Elements (BSEs) that they offer to ESPs.[52]

20. In addition to the ONA services that BOCs currently provide, there are ONA mechanisms to help ESPs obtain new ONA services they require to provide enhanced services. When an ESP identifies a new BSE that would be useful to it for providing an enhanced service, it can (1) request the service directly from a BOC through a 120-day process our rules established, or (2) it can request that the Information Industry Liaison Committee (IILC) consider the technical feasibility of the service.

21. Under the 120-day service request process, an ESP may request a new ONA basic service and must receive a response from the BOC within 120 days regarding whether the BOC will provide

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[50] Id. at 1037, para. 149.

[51] The services used by US West are: Uniform Call Distribution; Hunting; Call Transfer; Message Delivery Service; Closed User Group (Packet); Market Expansion Line; Flow Control Parameters (Packet); Logical Channel (Packet); Logical Channel Layout (Packet); Multiple Network Address (Packet); DID Call Transfer; Call Forwarding Variable; and Call Forwarding Busy Line. See US West 1994 ONA Annual Report (April 15, 1994).

[52] See generally 1994 BOC ONA Annual Reports.

the service.[53] The BOC must give specific reasons if it will not offer the service. The BOC evaluation is to be based on the ONA selection criteria set forth in the original Computer III Phase I Order: (1) market area demand; (2) utility to ESPs as perceived by the ESPs themselves; (3) costing feasibility; and (4) technical feasibility.[54] If an ESP finds the BOC response unsatisfactory, it may seek redress from the Commission by filing a petition for declaratory ruling.[55] To date, we have not received any such petitions.

22. ESPs can also ask the IILC for technical assistance in developing and requesting new network services.[56] Upon request from an ESP or carrier for a new unbundled network capability, the IILC establishes a task force composed of BOC, ESP, interexchange carrier (IXC), and customer premises equipment (CPE) manufacturer representatives to analyze and make recommendations on how the service might be provided. The task force evaluates the technical feasibility of the service and through a consensus process makes recommendations on how the service may be implemented. ESPs can then take the information to a specific BOC and request the service under the 120-day process. The IILC has been operating since 1988 and has reviewed a number of such requests, leading to a number of new BOC services.[57]

b. New Network Unbundling Since the BOC Safeguards Order

23. Since Commission approval of the BOC ONA plans in 1991, BOCs have continued to offer new ONA services as technology develops and as ESPs identify new basic services needed to provide enhanced services. In their 1994 BOC Annual Reports on ONA implementation, the BOCs reported a number of services available

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[53] BOC ONA Order, 4 FCC Rcd at 205-06, para. 397; BOC ONA Amendment Order, 5 FCC Rcd at 3117, para. 124; BOC ONA Further Amendment Order, 6 FCC Rcd at 7654-56, paras. 14-19.

[54] Phase I Order, 104 FCC 2d at 1065, para. 217.

[55] BOC ONA Further Amendment Order, 6 FCC Rcd at 7677-78, Appendix B.

[56] BOC ONA Order, 4 FCC Rcd at 32-33, paras. 52-54.

[57] Among the services for which requests were brought to the IILC and which were later implemented by the BOCs are services related to the delivery of calling number identification and a service that allows visual indicators that a party has messages waiting.

through new technologies that were not developed when their ONA plans were originally approved. These new technologies include Common Channel Signaling (CCS), Integrated Services Digital Network (ISDN), and Intelligent Networks (IN).

24. CCS is a network architecture under which call setup and billing data are transmitted using the Signalling System 7 (SS7) protocol through separate network facilities from those that transmit the actual communications between the calling party and the called party. SS7 enables ESPs to use such features to provide enhanced services as automatic recall, automatic call back, customer originated trace, distinctive ringing, selective call rejection, selective call acceptance, and caller ID. ISDN enables one digital communications network to handle simultaneous voice, data, and video transmissions. ISDN deployment will facilitate connectivity between Local Area Networks (LANs), as well as on-line data interfaces for on-line business transactions, work-at-home, and desktop conferencing.[58] Intelligent Network (IN) technology permits separation of service logic programs, databases, or both from traditional end office switches.[59] BellSouth reports efforts to implement several intelligent network applications that enable ESPs to develop customized end user services. Such services would allow ESPs to route customer calls, and to create new services for their customers by reconfiguring BOC AIN capabilities. For example, BellSouth anticipates that ESPs will use workstations to access BellSouth's Service Management System through a remote access network to develop new network services.[60]

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[58] Pacific Bell 1994 ONA Annual Report (April 15, 1994). New network services available through ISDN include ISDN Multiline Hunt Group, Hold Capability, Automatic Call Back and Call Forwarding, User-to-User Signaling with Call Control, Flexible Calling for Managing Multiple Calls and X.25 Supplementary Services. Id. at 8.

[59] IN uses the capabilities of decentralized logic modules (such as Service Control Points (SCPs)) to interact with the conventional digital, stored program-controlled switch. The logic modules are placed at separate network computers that communicate with the service hardware and software through the SS7 network. Advanced Intelligent Network (AIN) is the Bellcore version of one type of IN. The Commission has initiated a proceeding to consider issues related to IN implementation. See Intelligent Networks, CC Docket No. 91-346, Notice of Proposed Rulemaking, 8 FCC Rcd 6813 (1993). For a fuller discussion of IN, see infra para. 31.

[60] BellSouth 1994 ONA Annual Report (April 15, 1994).

c. ONA Amendment Requirements

25. In the Computer III Phase I Order and the BOC ONA Amendment Order, the Commission developed the ONA amendment process as an additional safeguard against access discrimination following the lifting of structural separation. Under this requirement, if a BOC itself seeks to offer an enhanced service that uses a new BSE or otherwise uses different arrangements for underlying basic services than those included in its approved ONA plan, the BOC must amend its ONA plan at least ninety days before it proposes to offer that enhanced service.[61] The BOC must obtain approval of the amendment before it can use the new basic service for its own enhanced services.[62]

26. The ONA amendment requirement provides a continuing opportunity after structural relief for the Commission and the public to identify potential access discrimination by the BOCs. For new ONA services that a BOC uses to provide enhanced services, the ONA amendment process enables the Commission and the public to identify discrimination before the services are approved. The ninety-day window gives competing ESPs notice so that they have an opportunity to develop new offerings on a competitive basis, and allows the Commission -- and the public -- to review the proposed amendment.[63] The amendment process also provides an opportunity to monitor BOC compliance with CEI safeguards, as the BOCs must demonstrate that each new BSE is available on a nondiscriminatory basis to competing ESPs. In these ways, the ONA amendment requirement is intended to make it more difficult for BOCs to engage in access discrimination.

d. Annual and Semi-Annual Reporting Requirements

27. The 1991 BOC ONA Further Amendment Order required the BOCs to file annual and semi-annual ONA reports.[64] By enabling ESPs and the Commission to monitor implementation of ONA by the BOCs, these reports are designed to serve as a further safeguard against access discrimination. These filings report: (1) projected deployment schedules for existing ONA services; (2) new ONA service requests from ESPs and ONA service requests that were

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[61] Phase I Order, 104 FCC 2d at 1068, paras. 221-22; BOC ONA Further Amendment Order, 6 FCC Rcd at 7654, para. 13.

[62] Id.

[63] Id.

[64] BOC ONA Further Amendment Order, 5 FCC Rcd at 7649-50, para. 4.

previously deemed technically infeasible; (3) information on SS7, ISDN, and IN projected deployment; (4) new ONA services available through SS7, ISDN, and IN; (5) progress on the implementation of service-specific and long-term uniformity issues; (6) billing information and Operation Support Systems (OSS) services; (7) and a list of BSEs used for the BOCs' own enhanced services. The Commission also required the BOCs to report semi-annually those ONA services tariffed in state and federal jurisdictions. The semi-annual reporting requirements include: the filing of a matrix of BOC ONA services and state and federal tariffs; data regarding state and federal tariffs; and the ONA Services User Guide that provides information on ONA services.

3. Other Nondiscrimination Safeguards in Computer III and the BOC Safeguards Order

28. The Computer III Phase I Order and the BOC Safeguards Order describe a set of additional rules intended to safeguard against access discrimination, including Customer Proprietary Network Information rules, network information disclosure rules, and nondiscrimination reporting requirements.[65] The CPNI rules balance efficiency goals with competitive equity and privacy considerations, and seek to prevent the BOCs from unreasonably using their access to information about customer usage patterns for competitive advantage.[66] Network information disclosure rules are designed to ensure that independent ESPs receive timely access to technical information related to new or modified network services affecting the interconnection of enhanced services to the BOC networks.[67] The nondiscrimination reporting requirements compare the quality of basic services provided to the BOCs' own enhanced services with those provided to the BOCs' ESP

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[65] California III expressly upheld the CPNI rules in the face of a challenge, and did not criticize the effectiveness of any of the other safeguards. 39 F.3d at 931.

[66] BOC ONA Order, 4 FCC Rcd at 223, para. 430; BOC ONA Amendment Order, 5 FCC Rcd at 3119, para. 137; BOC Safeguards Order, 6 FCC Rcd at 7605-14, paras. 75-89.

[67] Under our network information disclosure rules, a BOC must disclose the relevant network information to an ESP at the "make/buy point" (subject to the ESP's execution of a nondisclosure agreement) and to the public at a point six to twelve months before introduction of the new or modified network service. Phase II Order, 2 FCC Rcd at 3087-88, paras. 107-12; see Phase I Order, 104 FCC 2d at 1080-86, paras. 246-55.

competitors.[68]

29. There is evidence to suggest that these safeguards have been effective. For example, the Commission determined in the BOC Safeguards Order that BOC nondiscrimination reports over a three-year period showed that discrimination against competing ESPs had not taken place.[69] Nondiscrimination reports in the three years since that order have similarly not shown any access discrimination by BOCs. The nondiscrimination safeguards described in the BOC Safeguards Order provide the Commission and competing ESPs with data to monitor whether BOCs have engaged in access discrimination. Moreover, no formal complaints have been filed at the FCC by ESPs alleging BOC access discrimination since the Computer III Phase I Order.

C. Other Nondiscrimination Safeguards

1. Other Unbundling Proceedings

30. Since Computer III, the Commission has made further progress towards unbundling of BOC network facilities through the Expanded Interconnection proceeding.[70] The Commission's Expanded

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[68] Under our nondiscrimination reporting requirements, each BOC must: (1) demonstrate that its procedures and systems for providing services preclude discrimination in installation and maintenance, and quality of ONA services; (2) file annual affidavits attesting that it has not discriminated in the quality of installation and maintenance of ONA services provided to its ESP competitors; and (3) file quarterly reports comparing the timeliness of its installation and maintenance of basic services for its own enhanced services operations with that for all customers. See Phase I Order, 104 FCC 2d at 1055-56, para. 192, 1066, para. 218; Phase II Reconsideration Order, 3 FCC Rcd at 1160, paras. 76-77; BOC ONA Order, 4 FCC Rcd at 235, paras. 451-52.

[69] BOC Safeguards Order, 6 FCC Rcd at 7602, para. 67.

[70] Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (Special Access Interconnection Order), recon., 8 FCC Rcd 127 (1992), further recon., 8 FCC Rcd 7341 (1993), vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994); Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993) (Switched Transport Expanded Interconnection Order), pet. for review pending sub nom. Bell Atlantic v. FCC, No. 93-1743 (D.C. Cir., filed Nov. 12, 1993); Expanded Interconnection with Local

Interconnection orders have required the BOCs and other Tier 1 Local Exchange Carriers (LECs) to allow third parties to provide competitive interstate special access, transport, and tandem switched transport by interconnecting with the BOC networks. As a result of the Expanded Interconnection orders, the BOCs have unbundled switching and transport elements of their networks, and must permit third parties to virtually collocate their equipment at BOC end offices.[71] To the extent that competing ESPs find it useful to provide transport functions as part of their enhanced services, they can now do so independent of the Computer III framework. We solicit comment on whether expanded interconnection achieves some of the goals understood as "fundamental unbundling" at the time of the Computer III proceeding.[72]

31. The Commission is also moving towards greater unbundling of network service elements in its Intelligent Networks proceeding. As discussed above, several BOCs have begun to test intelligent network services. With intelligent networks, some of the intelligence currently located in software housed in every switch is placed instead in fewer, centralized databases. Intelligent networks facilitate the rapid creation of new services, because software modifications are made only to the centralized database, rather than to each individual switch. In 1993, in the

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Telephone Company Facilities, Transport Phase II, Third Report and Order, 9 FCC Rcd 2718 (1994) (Tandem Signalling Interconnection Order); see also Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order, FCC 94-190, 9 FCC Rcd 5154 (1994), appeal docketed sub nom. Southwestern Bell Telephone Co. v. FCC, No. 94-1547 (D.C. Cir. Aug. 10, 1994).

[71] Expanded interconnection does not require that BOCs permit physical collocation of enhanced services or customer premises equipment. Special Access Interconnection Order, 7 FCC Rcd at 7413-14, paras. 93-94; Switched Transport Interconnection Order, 8 FCC Rcd at 7412-13, para. 63. The Commission determined in Computer III that such collocation was not necessary to prevent access discrimination in the provision of enhanced services. Computer III, 104 FCC 2d at 1037-38, paras. 151-53. Moreover, the United States Court of Appeals for the District of Columbia Circuit held last year that the Commission did not have statutory authority to mandate physical collocation, and that such a requirement raised significant constitutional questions. See Bell Atlantic v. FCC, 24 F.3d 1441, 1447 (D.C. Cir. 1994).

[72] See supra para. 15 & n. 43.

Intelligent Networks proceeding,[73] the Commission proposed to require that Tier 1 LECs, including the BOCs, implement intelligent networks that offer third parties mediated access[74] to AIN functions. The Commission proposed to pursue serial implementation of mediated access at the LEC service management system,[75] then at the service control point,[76] and then at the switch. As technology develops, we anticipate that BOCs will continue to unbundle their networks and make new services available to competing ESPs. We solicit comment on the degree to which the unbundling contemplated in the Intelligent Networks proceeding would provide further protection against access discrimination.

2. The Effects of Market Forces

32. Market forces, in both the enhanced services and basic service markets, comprise another possible check on successful access discrimination by the BOCs against competing ESPs. The enhanced services marketplace has traditionally been, and appears to remain, competitive in character. As early as 1980, in the Computer II Final Decision, the Commission found that the enhanced services market was competitive.[77] In Computer III, the Commission concluded that the enhanced services market continued to

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[73] Intelligent Networks, CC Docket No. 91-346, Notice of Proposed Rulemaking, 8 FCC Rcd 6813 (1993) (Intelligent Networks NPRM); see also Intelligent Networks, Notice of Inquiry, 6 FCC Rcd 7256, 7256-57, paras. 4-7 (1991) (Intelligent Networks NOI).

[74] "Mediated access" allows a party other than a Local Exchange Carrier (LEC) to gain access to a LEC network for limited purposes, but prevents that party from engaging in activities that might compromise network reliability. See Intelligent Networks NPRM, 8 FCC Rcd at 6813, para. 4.

[75] Access to the service management system would allow third parties to select various parameters for the creation of new services. See id. at 6816-17, paras. 25-33. For instance, a customer could access the network to direct that all calls be sent to one location during certain hours and to another location during other hours. See id. at 6817, para. 28.

[76] Access to the service control point would allow third parties to make modifications to the centralized database that provides call handling information in response to network queries. See id. at 6818-19, paras. 34-47.

[77] Final Decision, 77 FCC 2d at 433, para. 128.

be "extremely competitive."[78] In 1993, parties supporting the petitioners in California III acknowledged that there is now "'a vibrant mass market for information [enhanced] services,'" that the voice mail market is competitive, and that most of the recent increase in subscribers for enhanced videotext services derived from the development of competitive ESP gateways.[79] The provision of enhanced services has also continued to be characterized by high rates of growth.[80]

33. The existence of well-established competing ESPs[81] appears to make it more difficult for BOCs successfully to engage in access discrimination. As the California I court stated, the Commission could reasonably conclude that large competitors like IBM could be relied on to monitor the quality of access to the network, reducing the ability of the BOCs to discriminate.[82] If the

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[78] Phase I Order, 104 FCC 2d at 1010, para. 95.

[79] Joint Brief of Petitioner-Intervenors at 15, 35-36.

[80] For example, nearly 100 newspapers, including Newsday and the Los Angeles Times, are now available electronically through competitive gateways such as America Online and Prodigy. See, e.g., Amy Harmon, Times Mirror Co. Launches On-Line Interactive Services, Los Angeles Times, October 27, 1994, at D1; Hanna Liebman, Newspapers Hit the Highway, Mediaweek, April 25, 1994, at 16. Numerous alliances between content providers and non-BOC ESPs have been announced in the past year alone. See, e.g., Los Angeles Times and Newsday/New York Go Online, Business Wire, Oct. 26, 1994; EDS, IT Network Form Cable Alliance, Dallas Morning News, Sept. 28, 1994, at 11D; Viacom Unit, American Online in Education Deal, Reuters, August 16, 1994; Mark Berniker, ABC Online: From Soaps to News, Broadcasting and Cable, July 11, 1994, at 32.

[81] Companies such as EDS, MCI, Viacom, Times Mirror, General Electric, and IBM are active participants in the enhanced services industry. See supra note 80; infra note 98. Large non-BOC corporations are well-established in the marketplace. For example, the U.S. market for value-added network services such as packet transmission and on-line databases was valued in 1993 at $3.4 billion, with the top six firms -- including BT Tymnet, SprintNet, INFONET, GE Information Services, IBM Information Network, and CompuServe -- controlling nearly half of the revenues. See U.S. Industrial Outlook 1994 at 29-7 (U.S. Government Printing Office).

[82] California I, 905 F.2d at 1233. The court also noted that the record supported the proposition that large competitors can bypass the local exchange network by using microwave or cable systems to link computers and their customers' terminals. Id.

BOCs do not provide services, ESPs may find alternative ways to provide those services that bypass the BOC local exchange networks entirely, or may move their distribution facilities out of the BOC's service area.[83] The continuing vibrancy of the enhanced service market also appears to suggest that provision by the BOCs of enhanced services pursuant to nonstructural safeguards has not proved seriously detrimental to competition.

34. We seek comment on the effect of market forces on the ability of BOCs to engage in access discrimination to the detriment of competition in the enhanced services market. We are particularly interested in whether and to what degree, as a result of competitive pressures, the threat of BOC access discrimination has diminished since the initial Computer III orders.

D. Costs and Benefits of Lifting Structural Separation

35. In this further notice we solicit comment on two issues related to the merits of structural separation. First, we seek comment regarding the issue raised by the court in California III. The court's remand presents the issue of whether the ONA framework, as implemented by the BOCs, provides sufficient public interest benefits and regulatory safeguards against access discrimination to justify replacing the current service-specific CEI plan regime for BOC enhanced services with full structural relief. In remanding this issue to the Commission, the court cited, for example, findings by the Georgia Public Service Commission that BellSouth had engaged in access discrimination in connection with its MemoryCall service.[84] The court also cited concerns raised by parties about the level of unbundling of network services included in approved BOC ONA plans and the absence of a fundamental unbundling requirement.[85] We have discussed above the existing access discrimination safeguards within the ONA framework and the current status of the implementation of those safeguards by the BOCs. We seek comments from parties regarding whether these access discrimination safeguards are adequate to support our moving from a CEI plan regime to one without any structural separation requirements. We also solicit comment on whether any increased risk of access discrimination should lead us to retain the CEI plan filing requirement, or whether a certain amount of increased risk is justified in return for the potential benefits of full structural relief.

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[83] See United States v. Western Electric, 993 F.2d 1572, 1578-79 (1993).

[84] California III, 39 F.3d at 929.

[85] Id. at 929-30.

36. Second, we seek comment on the broader issue of whether some form of structural separation should be reimposed for the provision of enhanced services by the BOCs. In response to California III, some parties have argued that the Commission should take a fresh look at whether the benefits of allowing the BOCs to offer enhanced services, or at least some enhanced services, on an integrated basis outweigh the costs in terms of the potentially greater risk of anticompetitive actions by the BOCs.[86] Other parties urge the Commission to affirm its earlier decisions granting full structural relief, because nonstructural safeguards are adequate to deter and detect discrimination by the BOCs and have led to the provision of many new enhanced services by the BOCs.[87] We discuss below briefly certain costs and benefits we have previously identified in granting structural relief to the BOCs.

37. The Commission has previously determined that structural separation hurts consumers by creating inefficiencies and slowing or preventing the development of enhanced services,[88] and this finding was upheld by the Ninth Circuit in both California I and California III.[89] In the Computer III proceeding, the Commission found that separation requirements "hinder the introduction of enhanced services that could benefit the public by being widely available through the BOCs' local exchanges."[90] In the first Computer III remand proceedings, the BOCs provided specific examples of new services that were delayed or abandoned as a result of the reimposition of structural separation requirements after California I.[91] The lifting of structural separation has

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[86] See, e.g., Letter from Richard E. Wiley, Wiley, Rein & Fielding, to Reed E. Hundt, Chairman, FCC, November 30, 1994.

[87] See, e.g., Letter from Richard D. McCormick, US West to Reed Hundt, Chairman, FCC, November 29, 1994; Ex Parte Statement from Fred Konrad, Ameritech to William Caton, Secretary, FCC, December 2, 1994; Ex Parte from Alan F. Ciamporcero, Pacific Telesis to William Caton, Acting Secretary, FCC, November 30, 1994.

[88] See, e.g., Phase I Order, 104 FCC 2d at 1008, paras. 89-94; BOC Safeguards Order, 6 FCC Rcd at 47-48, paras. 100-01.

[89] California III, 39 F.3d at 925; California I, 905 F.2d at 1232.

[90] Phase I Order at 1007, para. 89.

[91] BOC Safeguards Order, 6 FCC Rcd at 7618-19, para. 101 & n.196. For instance, US West stated that it has foregone deployment of its proposed fax store-and-forward service after the

coincided with rapid expansion of BOC enhanced services, and with continued growth in the availability of enhanced services. In 1990, the BOCs reported only 160,000 customers.[92] In 1994, according to the Interim Waiver Petition, BOCs provided enhanced services to approximately five million customers.[93] BOCs are currently providing enhanced services such as voice messaging, videotext gateways, electronic mail service, and on-line database transactions, as well as testing enhanced services associated with the provision of video dialtone service.[94]

38. On the other hand, various parties have suggested that structural separation should be reimposed for BOC enhanced services because of anticompetitive behavior by the BOCs. In the MemoryCall case cited in California III, the Georgia Public Service Commission concluded that BellSouth had manipulated the timing of the unbundling of certain network services in order to maximize its competitive advantage over competing voice messaging providers, and that BellSouth had failed to rectify technical limitations of its network that disadvantaged competing ESPs.[95] The Association of Telemessaging Services International describes problems raised by its independent messaging service companies in obtaining network services, and alleges that BOCs have misused CPNI and provided incorrect information to customers in order to prevent ESPs from offering competitive services.[96] The Newspaper Association of America argues that the Commission needs to look more closely at particular services such as electronic publishing that it claims may be offered separately without substantial costs and that present a greater need for protection against cross-subsidization and discrimination.[97] Other parties argue that structural safeguards are the "most effective and the least regulatorily intrusive" means of ensuring that the BOCs do not discriminate or cross-subsidize when they provide enhanced services. They argue further that structural separation would "promote innovation,"

California I decision.

[92] Interim Waiver Petition at 13.

[93] Id. at 4.

[94] Id. at Exhibit A.

[95] California III, 39 F.3d at 929.

[96] Letter from Robert J. Butler, Wiley, Rein & Fielding, to William F. Caton, Acting Secretary, FCC, December 13, 1994.

[97] Letter from Richard E. Wiley, Wiley, Rein & Fielding, to Reed E. Hundt, Chairman, FCC, November 30, 1994.

ensure a "competitive marketplace," and "facilitate the development" of the National Information Infrastructure."[98]

39. To obtain further information and more detailed evidence on these issues, we ask parties to comment on the relative costs and benefits of structural and nonstructural safeguards for the provision of enhanced services by the BOCs. We also seek comment on the protection against discrimination necessary to allow ESPs and BOCs to compete effectively without creating unnecessary burdens, whether certain types of enhanced services may require greater protection than others, and whether structural separation or additional nonstructural safeguards are needed for specific enhanced services. We ask parties to identify specifically both the problems attendant upon integrated BOC provision of enhanced services, and the appropriate means to address those problems. We also ask parties to identify any specific unbundled network services, not now available to ESPs, that are of use in designing new and innovative enhanced services and that satisfy the four criteria of the Computer III Phase I Order.[99] We seek comment on how best we can ensure their availability. To the extent that parties propose a reimposition of structural separation, we ask that they identify the benefits that they believe will accrue for the provision of enhanced services to consumers from such action, and articulate why these benefits cannot be achieved under a regime of nonstructural safeguards.

40. Our cost-benefit calculus must include a recognition that all the BOCs are currently offering some enhanced services on a structurally integrated basis subject to their approved ONA plans. A return to some form of structural separation requirements at this time would impose certain transition costs on the BOCs, and could result in service disruption and customer confusion. Some of these costs were detailed in the Interim Waiver Petition. The BOCs indicated that they would have to relocate hundreds of pieces of enhanced services equipment, transfer or hire hundreds of dedicated

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[98] Letter from Randolph J. May, Sutherland, Asbill & Brennan to William F. Caton, Acting Secretary, FCC, November 29, 1994. This letter was written on behalf of the following non-BOC ESPs and other organizations: Ad Hoc Telecommunications Users Committee, Association of Telemessaging Services International, CompuServe Incorporated, Consumer Federation of America, EDS Corporation, First Financial Management Corporation, Information Industry Association, Information Technology Association of America, International Communications Association, MCI Telecommunications Corporation, Prodigy Services Company, and Tele-Communication Association.

[99] Phase I Order, 104 FCC 2d at 1065, para. 217.

enhanced services personnel and replace integrated sales personnel with a dedicated direct sales force.[100] In 1991, US West and Pacific Bell estimated one time costs of transferring and/or duplicating facilities and personnel for the provision of structurally separate voice mail to be as high as $10-$15 million.[101] BOCs also estimated that overall costs for providing enhanced services on a separate basis would be up to 68% higher than integrated provision of those services and would result in price increases between 30% and 80%.[102] We seek comment as to what the costs of returning to structural separation would be today. We ask parties to identify transitional expenses that would be borne by customers of BOC enhanced services, and to indicate whether a return to structural separation requirements would result in disruptions of service or confusion among customers. To the extent that parties believe structural separation is appropriate, we ask them to describe particular scenarios and timetables under which BOCs would be required to move from the existing partially integrated CEI plan regime, and to identify the specific costs and benefits of those scenarios. Parties should also comment under what circumstances BOCs would be permitted to provide integrated enhanced services under any service-specific Computer II waivers.

V. EX PARTE PRESENTATIONS

41. This Notice of Proposed Rulemaking is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules.[103]

VI. REGULATORY FLEXIBILITY ANALYSIS

42. We certify that the Regulatory Flexibility Act[104] is not applicable to the rule changes we are proposing in this proceeding. If the proposed rule changes are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The BOCs are dominant carriers under the Commission's Rules and are not small entities as defined by the

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100 Interim Waiver Petition at Exhibit B.

101 BOC Safeguards Order, 6 FCC Rcd at 7621, para. 104.

102 Id.

103 See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

104 5 U.S.C. §§ 601-12.

Regulatory Flexibility Act. Thus, the parties directly subject to the proposals do not fall within the Act's definition of a small entity.[105] Accordingly, this Commission is not required to apply the formal procedures set forth in the Regulatory Flexibility Act. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq.

VII. COMMENT FILING DATES

43. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments with the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before April 7, 1995, and reply comments on or before April 28, 1995. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. In addition, parties should file a copy of any such pleadings with Peggy Reitzel of the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C.

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[105] Id. § 601. See MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 338-39, paras. 358-62 (1983).

VIII. ORDERING CLAUSE

44. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4, and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, and 201-205, a NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-169

In the Matter of	)	
	)	
Public Service Enterprises of Pennsylvania, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-93-091
	)	
AT&T Corp.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1995; Released: May 5, 1995

By the Commission:

I. INTRODUCTION

1. Before us is a complaint filed by Public Service Enterprises of Pennsylvania, Inc. ("PSE") against AT&T Corp. (formerly American Telephone and Telegraph Company) pursuant to Section 208 of the Communications Act of 1934, as amended (the Act).[1] PSE, a reseller of interexchange telecommunications services, alleges that AT&T violated provisions of the Act and certain Commission orders prohibiting unreasonable restrictions on resale by refusing to accept PSE's request for service under AT&T Tariff 12, Option 24. After AT&T made certain revisions to Option 24, which became effective January 5, 1994,[2] PSE amended its complaint to include allegations that the revisions were deliberately designed to make Option 24 unattractive to resellers such as PSE and effectively to deprive PSE of any opportunity to obtain the service it had requested. PSE seeks, in its amended complaint, a Commission ruling finding the revisions unlawful and directing AT&T to process PSE's request for the original Tariff 12, Option 24 service. PSE has also reserved the right to file a supplemental complaint for damages for harm allegedly suffered as a consequence of AT&T's actions. For the reasons and to the extent discussed

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1 47 U.S.C. § 208 (1992).

2 See AT&T Communications, Revisions to Tariff F.C.C. No. 12, Option 24, 9 FCC Rcd 350 (Com. Car. Bur. 1994).

below, we grant, in part, and otherwise deny, PSE's complaint.

II. BACKGROUND

2. The Commission first enunciated its policies and requirements concerning the resale of interstate telecommunications services in 1976.[3] "Resale" was defined by the Commission as the subscription to communications services and facilities by one entity and its reoffering of those communications services and facilities to the public (with or without 'adding value') for profit.[4] Prior to the seminal Resale and Shared Use Order, it was common practice for common carriers to prohibit completely the resale of their services through the use of tariff provisions, which, inter alia, limited a customer's use of service to the conduct of its own business. The tariffs also typically required that the customer ordering the service be the actual user. In the Resale and Shared Use Order, the Commission declared that such tariff restrictions on resale are unjust and unreasonable under Section 201(b) of the Act and unreasonably discriminatory under Section 202(a). The Commission reasoned that unlimited resale would serve the public interest because it would put competitive pressures on carriers to price their services closer to cost and it also would stimulate demand for service thereby reducing excess capacity.[5] The Commission has since issued a number of orders applying the resale policy to particular carrier practices, including for example, de facto tariff restrictions on resale.[6]

3. AT&T's Tariff 12 offers customized, network service offerings to high volume users needing multiple telecommunications services. These offerings are initially developed as individual Tariff 12 options for each prospective customer seeking a new service. Other prospective customers that are similarly situated to the original customer of a given option may request service under that option. Such would-be additional customers usually are, like the original customers themselves, large commercial end-users. Recently, however, certain resellers, including PSE, have requested service under various Tariff 12 options, including Option 24. These resellers would function as non-facilities brokers of the Tariff 12 service for their smaller volume end-user customers.

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3 Regulatory Policies Concerning Resale and Shared Use of Common Carrier Service and Facilities, 60 F.C.C. 2d 261 (1976) (Resale and Shared Use Order), recon. 62 F.C.C. 2d 588 (1977), aff'd sub nom. American Telephone and Telegraph Co. v. F.C.C., 572 F.2d 12 (2d Cir. 1978), cert. denied, 439 U.S. 875 (1978); see also Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 F.C.C. 2d 167 (1980) (Switched Network Resale Order), aff'd sub nom., Southern Pacific Communications Company v. F.C.C., 683 F.2d 232 (D.C. Cir. 1982).

4 Resale and Shared Use Order, 60 F.C.C.2d at 263.

5 Resale and Shared Use Order, 60 F.C.C.2d at 262-66, 283, 298-99; Switched Network Resale Order, 83 F.C.C.2d at 168-74.

6 See, e.g., MCI Telecommunications Corporation, 81 F.C.C.2d 568, 572-73 (1980); American Telephone & Telegraph Co., 84 F.C.C.2d 158, 186-87 (1980).

4. Tariff 12, Option 24 was originally developed and tariffed for a particular commercial customer in 1989.[7] In April 1993, three years after the service was first provided to the original customer, PSE formally requested service under Option 24. In a series of conversations and written correspondence with PSE representatives,[8] AT&T declined to accept PSE's request for service, stating that PSE first had to provide specific information about its customer base and network service requirements. AT&T maintained that detailed information about PSE's actual network locations and service element requirements was necessary to determine whether PSE qualified for service under the terms of Option 24.

5. On June 7, 1993, PSE filed the instant complaint with the Commission challenging AT&T's failure to accept its service request as unlawful under Sections 201(a), 201(b), 202(a), and 203(a) of the Act and the Commission's resale requirements. AT&T filed an answer denying PSE's allegations and moved to dismiss the complaint. Subsequently, on September 30, 1993, AT&T filed with the Commission proposed revisions governing certain discount plans in Option 24. PSE filed a petition to reject the revisions, claiming that AT&T deliberately designed them to make resale of the option uneconomical. On January 5, 1994, the Chief, Common Carrier Bureau, denied the petition to reject, finding that the transmittal did not, "on its face, conflict with a statute or with an agency regulation or order."[9] On January 14, 1994, PSE filed an amendment to the complaint essentially extending its arguments to the revised tariff and requesting the Commission to direct AT&T to provide the service to PSE under its prior tariff.

III. DISCUSSION

A. SECTION 201 AND THE COMMISSION'S RESALE REQUIREMENTS

1. Contentions of the Parties

6. PSE contends that AT&T's practice of requiring detailed customer location and service element information as a precondition to accepting an offer for an existing Tariff 12 Option is: (1) an unlawful refusal to provide service under Section 201(a) of the Act;[10] (2) an unjust and unreasonable practice within the meaning of Section 201(b) of the Act;[11] and (3) a violation of the

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7 PSE Complaint at 3 & Ex. B.

8 Id. at 3-6, Exs. A-D; AT&T Answer to Complaint at 11-12, Exs. 1-10.

9 AT&T Communications, Revisions to Tariff F.C.C. No. 12, Option 24, 9 FCC Rcd 350 (Com. Car. Bur. 1994).

10 47 U.S.C. § 201(a). The section states, in pertinent part, that "[i]t shall be the duty of every common carrier engaged in interstate . . . communication by wire or radio to furnish such communication service upon reasonable request . . . ."

11 47 U.S.C. § 201(b). The section states, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate] communication service shall be just and reasonable . . . ."

Commission's resale requirements.[12] PSE maintains that it is virtually impossible for it, as a reseller of AT&T's services, to market its services until it has first procured the underlying service it intends to resell from AT&T. PSE argues that AT&T is aware that resellers such as PSE are not in a position to solicit customers effectively until they can specify the terms and conditions of their own resale service. AT&T, states PSE, intentionally designed Tariff 12 to make it unavailable for resale[13] by requiring detailed network design information prior to accepting a potential customer's request for service.

7. PSE further asserts that AT&T has little or no need for network design information from prospective customers of existing offerings such as Option 24 because AT&T already knows that the essential service elements and cost characteristics for that option will be based on the same service elements and cost characteristics that were developed and tariffed for the first customer. Moreover, PSE claims that, as soon as PSE requested service under Option 24, AT&T was made aware that PSE had already agreed to take the minimum service elements and pay all required charges.[14] In addition, PSE contends that it followed its requests with repeated offers to guarantee payment for any unused circuits up to the service minimum and to provide security deposits.[15] PSE therefore argues that AT&T's purported concerns about PSE's ability and willingness to meet the minimum service specifications set forth in Option 24 are unfounded. PSE concludes that because it has demonstrated to AT&T that it can and will meet all of the commitments and requirements of Option 24 by the "Substantially Complete Installation" date as described in the tariff, it is similarly situated to AT&T's current Option 24 customers and is entitled to the service.[16]

8. In sum, PSE maintains that AT&T's practice of requiring prospective customers of existing Tariff 12 Options to provide detailed information about the customer's requested network before accepting the order effectively excludes reseller customers from eligibility for the service. PSE further argues that AT&T's rationale for this practice is invalid because AT&T does not need specific design information so early in the ordering process. PSE concludes that the practice is a refusal to furnish service upon reasonable request, in violation of Section 201(a) of the Act, and is an unjust and unreasonable practice, in violation of Section 201(b) of the Act. PSE charges that these violations pose direct threats to the pro-competitive concerns underlying the Commission's resale requirements[17] and violate requirements in the Commission's Tariff 12

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12 PSE Complaint at 7-11.

13 Id. at 14-15.

14 Letter from H. Levine, Counsel for PSE, to J. Zuckerman, Enforcement Division (June 24, 1994).

15 PSE Complaint at 6.

16 Id. at 9.

17 Id. at 10, citing Resale and Shared Use Order, 60 F.C.C. 2d at 265.

Orders prohibiting AT&T from preventing resale of that service directly or indirectly.[18]

9. AT&T responds that the requirement for advance information is reasonable and is not imposed to restrict resale. According to AT&T, it denied PSE's request for Option 24 because PSE failed to provide the necessary design information required under Tariff 12. AT&T argues that PSE's refusal to comply with AT&T's data collection requirements demonstrates that PSE is not "willing and able" to comply with the terms of Tariff 12.[19] According to AT&T, the information is supplied routinely by all prospective Tariff 12 customers and is necessary to the completion of the ordering process.[20] AT&T maintains that Tariff 12 is not a generic service that may be obtained "off the rack," but is a customized, complex service which takes time to develop and requires the active participation of both parties.[21] AT&T states that it must conduct a detailed analysis of data provided by prospective customers prior to acceptance of a Tariff 12 option contract for the following important reasons: (1) to assure that the service requested qualifies as an integrated service package; (2) to determine the costs of providing the service; (3) to provide an accurate estimate of the charges that will be imposed on the customer; and (4) to assess the customer's ability to meet the minimum annual charge. In addition, AT&T claims that unless the prospective customer specifies at the outset the service components it intends to use on its network, AT&T cannot make the threshold determination that the customer is "similarly situated" with the first. [22]

10. AT&T disputes PSE's claim that it already has sufficient information on the cost characteristics of a given option based on the revenue analysis performed for the first customer. AT&T argues that information on mileage sensitive costs, customer-specific characteristics, and other matters must be determined anew even when adapting an existing option for an additional customer.[23] AT&T asserts that the unique, customized nature of a Tariff 12 option requires each potential Tariff 12 customer, including prospective customers of existing options, to provide detailed information on the location and configuration of its service network, and that an order

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18 PSE Complaint at 10-11, citing AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 6 FCC Rcd 7039, 7050-52 (1991) (Tariff 12 Remand Order).

19 PSE Complaint at 16. The requirement that the prospective customer be "willing and able" to take the service was originally recognized in the Tariff 12 Order , 4 FCC Rcd at 938, itself quoting from precedential court decisions. See note 36, infra.

20 AT&T Answer at 12-13. In particular, AT&T notes that Section 7.2.18.A of the Tariff 12 General Regulations requires this information . Id. at 13.

21 Id. at 14.

22 Letter from M. Vaarsi, Counsel for AT&T, to J. Zuckerman, Enforcement Division (July 7, 1994).

23 Id.

cannot be accepted before this information is made available.[24] AT&T also charges that PSE's offer to guarantee payments for unused circuits is meaningless because AT&T cannot calculate its costs until PSE specifies the types and locations of the circuits.[25]

2. Discussion

a. Section 201(a)

11. Before we address the specific contentions of the parties, it is useful to examine briefly the nature of the resale industry in which PSE is a participant. As a group, resellers are characterized by certain common attributes that generally distinguish them from non-resale customers of AT&T. For example, the reseller does not normally use the service in the conduct of its own business, is typically not affiliated with other users of the service, does not own or otherwise control the premises where the service is provided and often procures a service before it knows who its customers will be. Thus, to the extent that an established reseller is in a position to order service that requires a long-term commitment, a long order-to-cutover interval, or high volume commitments, it generally does so at risk because it is not certain what customers it can acquire today for a service not available until some time in the future. That is, the reseller speculates that the future savings it can offer to the public will enable it to solicit sufficient customers for its resold service to cover the underlying tariff charges and yield a profit. The reseller, therefore, does not necessarily know in advance the precise location of its future customers' points of service.

12. After careful consideration of the evidence and arguments presented by the parties, we conclude that AT&T violated Section 201(a) of the Act by failing to accept PSE's request for Option 24 service. The Commission has consistently required common carriers to meet their Section 201(a) obligations and has emphasized that:

> carriers who are requested to provide services should make all efforts to do so, such as providing them under protest pending the resolution of complaints, petitions, or litigation, rather than refusing to meet a questionable obligation until after the complaint or litigation is resolved. Those who choose the course of non-compliance are on notice that they will be acting at their own peril, should the question of the legitimacy of their refusal to meet their common carrier obligations be decided against them.[26]

In the instant case, PSE, a would-be reseller of Option 24, formally requested the service in April 1993 and repeated its request in numerous discussions and correspondence with AT&T representatives.[27] The four principal reasons given by AT&T for declining PSE's request are not

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24 AT&T Answer at 13-16, 21.

25 Id. at 15.

26 In the Matter of Hawaiian Telephone Company, 78 F.C.C.2d 1062, 1065 (1980).

27 See PSE Complaint, Exs. A-D; AT&T Answer, Exs. 1-10.

persuasive. [28]

13. We find without merit AT&T's first explanation, i.e., that it must obtain detailed design and network information in advance from all prospective customers of an existing option to assure that the requested service constitutes an integrated service package as required by the Commission's Tariff 12 Orders. As we note above, Tariff 12 options are initially developed based on the particular needs of a specific prospective customer seeking new service. Once the proposed Option's service parameters for the initial customer have been reviewed by the staff and allowed to take effect, however, the relevant standards for AT&T's provision of service are the service elements and the usage and revenue minima of that option that are set forth in the tariff. Moreover, under Section 203 of the Act,[29] a carrier cannot lawfully enforce a term or condition unless that term or condition is specified in the tariff. Because AT&T's Tariff 12 does not define an "integrated service package," or otherwise specify that a prospective customer will be required to demonstrate that the service it seeks constitutes an integrated service package, any action by AT&T to deny a request for service under an existing option because the requested service allegedly does not meet the untariffed standard would violate Section 203.

14. The next three reasons AT&T offers for declining PSE's request -- to determine service costs, to provide accurate estimates of charges, and to assess PSE's ability to meet minimum usage requirements -- are similarly unpersuasive. Existing Tariff 12 Options already set out cost and pricing parameters for each option. For example, at the time PSE requested service, Option 24 required that a customer order a specified minimum number of voice and data transmission circuits of various bit rates and mileage bands for both domestic and international service. The customer was obligated to pay $1.5 million a month for five years beginning with the Substantially Complete Installation Date, whether or not the customer's usage generated monthly charges equal to that amount. The option also contained significant financial penalty charges if the customer wanted to activate early termination clauses. The measured usage sensitive rate elements were separated into five schedules, denominated A through E, for five different types of calls to and from the network, each of which was further broken down by time of day and day of the week. There were various applicable discounts and fee waivers, including the domestic usage volume pricing plan, with discounts depending on monthly minutes of use ranging from 5.6 percent to 25 percent of certain combinations of Schedules A through E.

15. Given the level of network and financial detail that AT&T has already developed and tariffed for Option 24, we are not convinced that even if PSE could provide, in advance, information about its network configuration AT&T needs this information to accept a request for service from PSE, or any other prospective customer. In the Tariff 12 context, we find that the

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28 See para. 9, supra.

29 Section 203(a) provides, in part: "Every common carrier . . . shall file with the Commission . . . schedules showing all charges for [interstate communications]." Section 203(c) provides, in part: "No carrier . . . shall engage or participate in such communications unless schedules have been filed and published . . . and no carrier shall . . . (3) extend to any person any privileges or facilities, in such communications, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c).

level of detail AT&T required of PSE in this case is not a necessary or reasonable precondition to accepting PSE as a customer under the option. AT&T already calculated its essential costs for providing Option 24 when it developed the tariffed offering. Moreover, while a customer's net monthly price will vary depending on the customer's usage and mileage factors, the underlying rates for each of these price variables cannot change because each has already been tariffed. Similarly, although AT&T may need increasingly specific information on the new customer's precise private network architecture as the actual, physical implementation process proceeds, AT&T does not need this information at the outset to make the threshold decision of whether to accept the order. While AT&T has questioned whether PSE can meet Option 24's minimum usage requirements, PSE offered to secure AT&T against financial risk associated with providing the offering[30] and AT&T has not shown that this voluntary measure is inadequate to address its concerns. AT&T does not question PSE's credit-worthiness or good faith.

16. We also reject AT&T's final claim that the advance network design information it seeks is required to determine whether PSE is "similarly situated" to the original Option 24 customer. While a carrier may refuse to provide actual service to any party that is not similarly situated with other customers of that service,[31] it is unreasonable for AT&T to use this standard to bar preemptively prospective customers from ordering the service when they will likely possess all design details prior to the initiation of the actual service, although they cannot provide these details at the time of the service request. Once the start date of a Tariff 12 Option (Substantially Complete Installation date) has been mutually negotiated and the customer has not satisfied the terms of the Option by that date, AT&T retains the remedy of discontinuing the service and exercising the financial penalty provisions contained within Tariff 12.[32] Under these and the other circumstances we describe in paragraphs 12-15 above, we conclude that AT&T's failure to accept PSE's reasonable request for Option 24 service violates Section 201(a) of the Act.

b. Section 201(b)

17. We also find that AT&T's requirement of specific location and design information that it states is a precondition of service (and which it tariffed in Section 7.2.18.A of the General Regulations of Tariff 12) constitutes an unjust and unreasonable practice within the meaning of Section 201(b) of the Act. This determination follows principally from our conclusion that AT&T has failed to establish that the detailed advance information requirements at issue are necessary or reasonable preconditions to accepting a request by PSE, or any other prospective customer, for Option 24 service. We do not agree with AT&T's assertion that its information requirements,

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30 PSE stated that it "is willing to guarantee payment for any unused circuits up to the minimum service requirements as of the substantially complete installation . . . and has at all time been willing to post an appropriate security deposit for Option 24." PSE Complaint, Ex. A at 4.

31 See e.g. Sealand Service, Inc. v. I.C.C., 738 F.2d 1311, 1316-19 (D.C. Cir. 1984).

32 For example, the customer's "Discontinuance with Liability" provision of Option 24 requires customers to pay "a Termination Charge equal to the lesser of $20,000,000 or 35% of the total Minimum Annual Charges (MAC) for the unexpired portion of the applicable service period." See Option 24, Section 7.26.1.D

as expressed in Section 7.2.18.A, are an indispensable part of the initial ordering phase for an existing Tariff 12 option. AT&T's contention that it faces an unreasonable risk if it accepts an order for an existing option without all details of the customer's network design is unavailing for the reasons stated above. AT&T structured Option 24 to maximize its opportunity to provide service to the original Option 24 customer while minimizing its financial risk through the adoption of numerous protective financial tariff provisions.[33] AT&T may be correct in its assertion that the development of a new Tariff 12 Option must depend on network information provided by the customer early in the ordering process. Once that information is supplied and the package created, however, subsequent requests for service are premised on the requester's using the network parameters defined by that Tariff 12 network package.[34] AT&T already should have a relatively accurate estimate of the cost and pricing characteristics of the option.

18. Finally, while AT&T has not produced a reasonable justification for the practice of requiring that specific location information be provided by prospective customers such as PSE as a precondition to accepting a request for service, we can envision circumstances where it would be reasonable to impose limits on the number of locations served by an offering, e.g., if the cost characteristics of an existing option were premised on service to a limited number of network locations. Yet, such limits would have to appear specifically in the tariff, and Option 24 contains no such tariffed limits. We believe that AT&T's concerns regarding PSE's ability to generate sufficient network traffic to meet the minimum requirements established for the original Option 24 customer can be adequately addressed through guarantee commitments and deposit requirements. This would obviate the need to resort to rigid information requirements. To the extent that AT&T relies on the location provision of Section 7.2.18.A of the Tariff 12 General Regulations to support this practice, we declare that provision unlawful and find that it has no further effect. Moreover, we note that PSE asserts, and AT&T has not disputed, that AT&T already has a favorable credit and service experience with PSE through PSE's membership in AT&T's Tariff 12, Option 51 offering.

c. Resale Requirements

19. We also find that AT&T's insistence on the detailed advanced information at issue constitutes an unreasonable restriction on resale in violation of our resale orders and requirements, as specifically made applicable to Tariff 12 options by our Tariff 12 Orders.[35] The record before us contains little evidence or arguments that would enable us to determine the effect of AT&T's advance information requirements on prospective non-resale customers for

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33 For example, in addition to the termination liability charges discussed in note 31, supra, the General Regulations of Tariff 12 allow AT&T to impose charges on a customer for cancellation (Section 7.2.14.A), and can require advanced payment or deposits from the customer "if there is a history of late payment or the customer's financial responsibility is not a matter of record" (Section 7.2.10.B & C).

34 In this regard, we note that PSE repeatedly offered to provide AT&T additional information about its network on a timely basis once such information became available. See PSE Complaint at 9.

35 See n. 18, supra.

Option 24. We can reasonably conclude from the record, however, that the advance requirements pose substantial burdens on resale customers such as PSE because they often do not have and, therefore, cannot provide all the network design information in advance due to the nature of their operations. We have carefully considered AT&T's rationale for its advance information requirements but find no valid business purpose for the requirements, as applied to resale or non-resale customers, that would justify the substantial burdens this practice imposes. Requirements such as those at issue here have the effect of discouraging resale, thus undermining our pro-competitive policies. We must, and will, exercise vigilance to ensure that carrier practices do not undermine the pro-competitive policies enunciated in our resale orders.[36] We therefore find that AT&T's insistence on detailed information -- including specific information on all customer locations and service elements within PSE's network design -- before accepting PSE's request for Option 24 service also violates the Commission's resale requirements.

B. SECTION 202(a) DISCRIMINATION CLAIMS

1. Contentions of the Parties

20. PSE contends that AT&T's practice of requiring resellers to provide detailed design information as a precondition to service, without requiring such information of its non-resale customers, constitutes unjust discrimination within the meaning of Section 202(a) of the Act.[37] PSE argues that the Commission has consistently interpreted Section 202(a) to require that AT&T's Tariff 12 options be made generally available to all similarly situated customers.[38] PSE notes that the Commission specifically stated that it would scrutinize closely any restrictive eligibility requirements to ensure that they are not pretexts for unreasonably discriminating among customers.[39] PSE maintains that AT&T's "strained interpretation" of the monthly usage and basic charge provisions in Section 7.26.2 of the Tariff imposes eligibility requirements that fall almost exclusively on resellers and effectively foreclose resellers from obtaining service, in violation of

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36 See generally: Resale and Shared Use Order; Switched Network Resale Order, supra. We recently issued a notice of apparent liability for forfeiture of $1 million against AT&T for failure to process the requests of three resale carriers for service under Contract Tariff 383, in apparent violation of Section 201(a) of the Act and our resale requirements. See AT&T Corp., Notice of Apparent Liability for Forfeiture and Order to Show Cause, FCC 95-359 (released Jan 4, 1995).

37 Section 202(a) provides that: "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communication service, directly or indirectly, by any means or device . . . ," 47 U.S.C. § 202(a).

38 PSE Complaint at 9-10, citing AT&T Communications, Revisions to Tariff F.C.C. No. 12, 4 FCC Rcd 4932, 4938-39 (1989), on recon., (Tariff 12 Order) 4 FCC Rcd 7928 (1989), on remand, 6 FCC Rcd 7039, 7050-52 (1991) (Tariff 12 Remand Order); see also Sea-Land Service, Inc. v. I.C.C., 738 F.2d 1311 (D.C. Cir. 1984).

39 PSE Complaint at 9-10, citing Tariff 12 Remand Order, 6 FCC Rcd at 4938.

Section 202(a).[40] PSE argues that because it has demonstrated to AT&T that it can and will meet all of the commitments and requirements of Option 24 by the "Substantially Complete Installation" date set forth in the tariff, it is similarly situated to AT&T's current Option 24 customer and is entitled to the service under Section 202(a).[41] In its amended complaint, PSE reiterates it discrimination argument, claiming that the revisions to Option 24 are yet another attempt by AT&T to foreclose resellers from obtaining that service.

21. In response, AT&T maintains that PSE's request for Option 24 was declined based solely upon PSE's failure to provide information routinely required of all other prospective Tariff 12 customers.[42] AT&T argues that it has treated PSE no differently than any other prospective customers and cannot lawfully provide PSE the special treatment that it seeks.[43] AT&T contends that there is no support in the record for PSE's claim that other Tariff 12 customers have not been required to produce the same advance information requested of PSE.[44]

2. Discussion

22. Applicable judicial decisions establish a three-prong test for determining whether a violation of Section 202(a) has occurred. First, the Commission must determine whether the services at issue are like one another. Second, it must resolve whether there is disparate pricing or treatment between the like services. Third, if disparate pricing or treatment is found to exist, the Commission must decide whether such disparity is justified and, therefore, not unreasonable.[45] In a Section 208 complaint proceeding, the complainant has the evidentiary burden of establishing that the services are like and that discrimination exists between them. Once like services and discrimination are established, the burden shifts to the defendant carrier to show that the discrimination is not unreasonable.[46]

23. Initially, we note that both PSE and AT&T elected to forego discovery or additional briefing on PSE's Section 202(a) claims. After careful review of the limited filings submitted by the parties on this issue, we conclude that the record is insufficient to find a violation of Section 202(a). Because the service PSE seeks is the same Option 24 service AT&T offers to its non-resale customers, whether like services are involved is not at issue. PSE has presented no

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40 Id. at 9. We note, however, that PSE has provided no evidentiary support for its claim that the burden of AT&T's eligibility requirements fall almost exclusively on resale carriers.

41 Id.

42 AT&T Answer at 12 -13.

43 Id.

44 Id.

45 See Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5903 (1991); MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990).

46 Id.

evidence that would enable us to determine whether the information and ordering requirements AT&T places on prospective resale and non-resale customers differ in any substantial way. Nor is there evidence in the record that would enable us to determine that the requirements are less burdensome on non-resale customers as to be considered unreasonably discriminatory within the meaning of Section 202(a). Although we determined in Section III.A.2. above that AT&T's advance information requirements are unreasonable under Section 201(b) of the Act and are contrary to our resale orders and requirements, these findings are based on our view that the requirements, as applied to resale and non-resale customers alike, constitute an unnecessary precondition to service. The record is lacking in specific facts to support PSE's allegations that the requirements are more burdensome on resale customers than non-resale customers. Therefore, we find no basis upon which to conclude that AT&T's information requirements are unlawful within the meaning of Section 202(a).[47] In any event, as discussed in paragraphs 11-20 above, we have found these requirements to violate Section 201 of the Act and our resale requirements. AT&T will be required to cease its unreasonable practice consistent with our decision.

C. SECTION 203

1. Contentions of the Parties

24. PSE contends that AT&T's practices violate Section 203 of the Act, which it claims requires carriers to provide service subject to the terms, conditions, and rates set forth in the applicable tariff for the service.[48] According to PSE, Section 7.1 of Tariff 12's General Regulations specifically states that every Tariff 12 option will be generally available to "customers under conditions not substantially different from those specified in each option."[49] First, PSE contends that AT&T has insisted that PSE's order must conform exactly to the specified minima of the option, with no provision for the inevitable, normal amount of traffic fluctuations that occur in any network. This requirement, states PSE, contradicts Section 7.1 of Tariff 12 and therefore, Section 203 of the Act.[50] PSE contends further that AT&T's practice of restricting the availability of Option 24 to resellers in the manner described in paragraphs 6-8 above violates Section 7.2 of Tariff 12 which provides that "VTNS may be resold or shared."[51]

25. Alternatively, PSE argues that AT&T implements a strained interpretation of Section 7.26 of Tariff 12 which requires that PSE's order rigidly conform to the precise service mixes and

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47 GTE Telephone Operating Companies, Transmittal 506 et al., 5 FCC Rcd 5690, 5691 (1990).

48 PSE Complaint at 12-13.

49 Id. at 13, citing AT&T Tariff F.C.C. No. 12, 5th revised page 41 (9/22/93) and Tariff 12 Remand Order, 6 FCC Rcd at 7055.

50 PSE Complaint at 11-12.

51 PSE Complaint at 12, citing AT&T Tariff F.C.C. No. 12, Section 7.2.5, 8th revised page 43 (9/22/93).

usages of the Option. This interpretation, states PSE, creates ambiguity in the tariff between Section 7.1 (service provided if conditions not substantially different) and Section 7.26 (imposition of exact service mixes and minima). PSE contends that given this ambiguity, Commission rules and decisions require that Section 7.26 be construed against AT&T and in favor of PSE.[52]

26. AT&T, disputing PSE's claims, argues that provisions in Tariff 12 and in Option 24 explicitly and implicitly require precise network information in advance from all customers both resale and non-resale.[53] Most significantly, AT&T points to Section 7.2.18.A which states that "[w]hen a Customer places an order for [a Tariff 12 Option], the following information must be provided: the Customer contact name, telephone number, and address of each premises where installation will be made, the Customer's billing name and address, etc." AT&T argues that this specific provision supersedes the tariff's more general provisions about general availability and resale upon which PSE relies.[54]

27. AT&T further contends that while 7.26.2.E of Tariff 12 does allow prospective customers to modify the mix of specific service options relative to the initial design of an option, it nevertheless requires that the option's service minima be observed.[55] Finally, AT&T claims that plain language in 7.26 stating that "AT&T and the Customer will establish the proportion of the initial network configuration that will constitute Substantially Complete Installation" clearly implies that AT&T and the prospective customer must reach agreement in advance on the initial network configuration.[56]

2. Discussion

28. We do not agree with PSE's contentions that AT&T has violated Section 203(a) by virtue of its interpretation of certain terms of its tariff. Section 203 is intended primarily to insure that carriers file all rates and regulations in their tariffs and abide by them upon all occasions. To determine whether a violation of Section 203(a) occurred, we must look to the actual language of the tariff. In reviewing the tariff language, we find neither specific violations of AT&T's tariff provisions nor the ambiguity between tariff provisions that PSE claims. Rather, we find that AT&T's interpretation of its tariff is consistent with the language contained in Section 7.2.18.A and other tariff provisions contained in its Tariff 12. There is no evidence to support PSE's claim that AT&T has applied the terms of the tariff inconsistently among prospective customers, and we therefore deny that count of PSE's complaint. We have found on other grounds, however, that

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52 Id. at 13-14, citing The Associated Press, 72 F.C.C. 2d 760, 764-65 (1979) and 47 C.F.R. § 61.2 (all tariff publications must contain clear and explicit explanatory statements regarding rates and regulations).

53 AT&T Answer at 16-19.

54 Id., citing AT&T Tariff F.C.C. No. 12, 3rd revised page 46.6.2 (9/22/93).

55 AT&T Tariff F.C.C. Tariff No. 12, Section 7.26.2.E, 3rd revised page 305 (10/12/92); see Vaarsi Letter, supra, at 2 n. 2.

56 Id., citing AT&T Tariff F.C.C. No. 12, 2nd revised p. 47.2.1. (Definitions) (9/22/93).

terms and conditions pertaining to information requirements, as a precondition to service, are an unjust and unreasonable practice under Section 201(b) and constitute an unreasonable barrier to resale within the meaning of our resale orders. We recognize also that our finding will affect the practical application of the term "Substantially Complete Installation," contained in Section 7.2.26 of Tariff 12, because all of the information necessary to establish a mutually acceptable installation date can no longer be required as a precondition for accepting a service request from any prospective customer of an existing Tariff 12 Option.

D. RELIEF REQUESTED/AMENDED COMPLAINT

29. In its original complaint, PSE requested an order directing AT&T to cease and desist from the alleged unlawful practices and to offer PSE Option 24 services under the same terms and conditions afforded to other Option 24 customers.[57] PSE also reserved the right to file a supplemental complaint for damages based on AT&T's alleged violations.[58] Following AT&T's revisions to Option 24, PSE filed its amended complaint challenging the lawfulness of the revisions and requesting an order by the Commission directing AT&T to provide PSE service under Option 24 as it existed prior to the alleged unlawful revisions.[59]

30. After discussions with the parties, we believe the decisions we make here, finding that AT&T's actions of which PSE complain violate Sections 201(a) and 201(b) of the Act and the Commission's resale requirements, provide the parties with a framework to reach a mutually satisfactory settlement of this complaint. Therefore, we do not address at this time the request for specific performance of AT&T's original Option 24 offering that PSE seeks. Consistent with these findings and conclusions, we hereby direct the parties to engage in good faith negotiations aimed at resolving any remaining issues pertaining to PSE's request for service and any damages liability. The parties' discussions regarding PSE's particular service needs and damages suffered as a consequence of AT&T's actions may mitigate any concerns PSE has regarding the lawfulness of AT&T's revisions to Option 24. PSE will, of course, have the opportunity to file a supplemental complaint to pursue any available remedies should the parties negotiations prove unsuccessful.

E. CONCLUSION

31. For the reasons discussed above, we conclude that AT&T's refusal to accept PSE's request for service under Tariff 12 Option 24, violated Section 201(a) of the Act. We also conclude that AT&T's advance information requirements constitute unjust and unreasonable practices under Section 201(b) of the Act and violate our resale orders and requirements. Finally, we direct PSE and AT&T to engage in good faith negotiations aimed at resolving remaining service and damages issues consistent with our findings and conclusions. We will afford PSE

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57 PSE Complaint at 14.

58 Id. at 15.

59 PSE Amended Complaint, filed Jan. 14, 1994.

an opportunity to file a supplemental complaint should such negotiations fail.

IV. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 201, 202(a), 203(a) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 201, 202(a), 203(a) and 208, that the formal complaint filed by Public Services of Pennsylvania, Inc., on June 7, 1993, as amended January 14, 1994, against AT&T Corporation (formerly American Telephone and Telegraph Company) IS GRANTED to the extent discussed above and otherwise IS DENIED.

33. IT IS FURTHER ORDERED that the motion to dismiss complaint, filed by AT&T on July 23, 1993, IS GRANTED with respect to PSE's Section 202(a) claims and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-172

In the Matter of	)	
	)	
AT&T CORP.,	)	
	)	
Complainant,	)	
	)	
	)	
v.	)	
	)	
TELEPHONE UTILITIES EXCHANGE CARRIER ASSOCIATION, et al.,	)	File No. E-94-039
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995 Released: April 26, 1995

By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that AT&T Corp. (AT&T)[1] has met its burden of establishing that the defendant Telephone Utilities Exchange Carrier Association (TUECA) and its local exchange carrier (LEC) members have violated Section 201(b) of the Communications Act of 1934, as amended (the "Act"),[2] by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1991 through December 31, 1992. Therefore, we award AT&T monetary damages plus interest computed at the relevant Internal Revenue Service (IRS) rate compounded daily.

II. BACKGROUND

2. AT&T filed this complaint on January 28, 1994, alleging that the defendant violated the Commission's rate-of-return prescription for the January 1, 1991 through December 31, 1992 monitoring period. The case presented by AT&T is virtually identical to the case presented in AT&T Communications v. Northwestern Bell Telephone Co.[3] In that proceeding we held that LEC rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Act.[4] We also held that a complainant is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of that proceeding, we held that AT&T had properly shown that it had been harmed by paying the defendants' rates that produced the excessive overall earnings and awarded AT&T monetary damages, plus interest computed at the IRS rate.[5]

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1 At the time this complaint was filed AT&T's corporate name was American Telephone and Telegraph Company. On April 20, 1994, AT&T changed its corporate name to AT&T Corp.

2 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with . . . communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

3 American Tel. and Tel. Co. v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1990) (AT&T Liability Order), appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam); see also MCI Telecommunications Corp. v. Pacific Northwest Bell Tel. Co., 5 FCC Rcd 216 (1990) (MCI Liability Order), recon. denied, 5 FCC Rcd 3463 (1990) (MCI Reconsideration Order) (jointly "MCI Orders"), appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

4 AT&T Liability Order at 143.

5 AT&T Communications v. Northwestern Bell Tel. Co., 8 FCC Rcd 1014 (1993) (AT&T Damages Order), appeal docketed sub nom. U S WEST Communications, Inc. v. FCC, No. 93-1223 (D.C. Cir. Mar. 22, 1993);

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

3. AT&T alleges that the rates it paid for certain of TUECA's interstate access services during the period from January 1, 1991 through December 31, 1992 were unjust and unreasonable in violation of Section 201(b) of the Act. AT&T supports its allegations with evidence taken from the Form 492[6] filed with the Commission by TUECA for the two-year period at issue, which shows that TUECA achieved earnings in excess of the Commission's prescribed rate of return for overall interstate access.[7]

4. AT&T requests that the Commission declare that TUECA's charges for the period from January 1, 1991 through December 31, 1992 are in violation of the rate-of-return prescription and Section 201(b) of the Act, and order TUECA to pay damages to AT&T equal to the difference between the amount actually paid by AT&T for interstate access service during the period and the amount that AT&T would have paid if TUECA's charges earned no more than the maximum allowable rate of return, plus interest compounded daily at the IRS rate for tax overpayments.

5. TUECA advances a number of arguments to support its claim that it cannot be held liable for damages based solely on the fact that its rates produced earnings in excess of the Commission's prescribed rate of return. According to TUECA, to pursue a damages claim, AT&T must first show that TUECA charged unjust and unreasonable rates for interstate access services during the period in question, not that TUECA's rates produced excessive returns.[8] Moreover, TUECA argues, Section 206 of the Act[9] requires that AT&T prove compensable injury in addition to establishing a violation of the Act.[10] TUECA maintains that by simply referencing TUECA's earned rate of return for interstate access service,

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see also MCI Telecommunications Corp. v. Pacific Bell Tel. Co., 8 FCC Rcd 1517 (1993) (MCI Damages Order), appeals docketed sub nom. MCI Telecommunications Corp. v. FCC, No. 93-1166 (D.C. Cir. Feb. 18, 1993).

6 47 C.F.R. § 65.600.

7 TUECA's Form 492, filed on behalf of its LEC members on September 23, 1993, shows that TUECA's LEC members earned a rate of return of 13.81% on total interstate access services, above the prescribed level of 11.25% plus .25% buffer. See 47 C.F.R. § 65.700(b); Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990) (Represcription Order), petition for review denied sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).

8 TUECA Brief at 2.

9 47 U.S.C. § 206.

10 TUECA Brief at 2; TUECA Reply Brief at 3.

AT&T has not only failed to allege any facts that would establish that TUECA's rates were unjust and unreasonable during the period in question, but has also failed to show that it sustained actual damage as a result of those rates.[11]

6. To bolster these arguments, TUECA contends that AT&T has failed to sustain its burden of proof under the D.C. Circuit's decision in Virgin Islands Telephone Corp. v. FCC.[12] TUECA argues that in Vitelco, the court made it clear that unreasonable rates cannot be inferred from the mere fact that a rate of return exceeded the prescribed maximum.[13] Using the factors it contends the court in Vitelco established for evaluating whether a rate is reasonable, TUECA argues: (1) that its projections were reasonable at the time they were made; (2) that the ratepayers have suffered no harm; (3) that TUECA's member LECs are predominantly small and rural and are therefore more susceptible to changes in the market environment; and finally, (4) that an award of damages to AT&T based on carrier overearnings is inappropriate for equitable and policy reasons.[14] Regarding equitable considerations, TUECA further states that AT&T would receive windfalls if AT&T has passed the "overcharges" on to its customers and is now awarded damages without any requirement to flow through any recovery from TUECA to its ratepayers.[15] Moreover, TUECA contends that under the "filed rate" doctrine, a properly filed tariff that the Commission allows to go into effect is presumptively valid. Therefore, TUECA claims that without substantive proof to the contrary, AT&T has failed to meet its burden of proof.[16]

2. Discussion

7. We have carefully examined the record before us and conclude that most of TUECA's arguments must be rejected under the controlling precedent of the AT&T Liability Order and the AT&T Damages Order (jointly "AT&T Orders"). TUECA has cited no facts and has made no arguments in these proceedings that would warrant rulings contrary to the AT&T Orders.

8. Section 201(b) of the Act. TUECA's contention that AT&T's damages claims must be dismissed because AT&T has failed to prove that

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11 TUECA contends that AT&T admitted that it suffered no harm by stipulating in its Brief that "for purposes of this litigation only, [AT&T] is not contending that TUECA's actions had any adverse effect on AT&T's authorized or achieved rate of return." TUECA Reply Brief at 3 (quoting AT&T Brief at n.3). We note, however, that AT&T is subject to price cap regulation rather than rate-of-return regulation and, therefore, the fact that AT&T makes no claim of harm to its rate of return appears to be irrelevant to this proceeding.

12 989 F.2d 1231 (D.C. Cir. 1993) (Vitelco).

13 TUECA Brief at 5.

14 Id. at 6-9.

15 Id. at 7-9.

16 Id. at 8-9.

TUECA's rates were unjust and unreasonable within the meaning of Section 201(b) of the Act is without merit. In the AT&T Liability Order, the Commission held that AT&T could prove that the defendants' rates were unjust and unreasonable under Section 201(b) of the Act by proving that the defendants violated our rate-of-return prescription.[17] The Commission has also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[18] As the Commission stated in the AT&T Liability Order, "legally effective, carrier-initiated tariffs can always be challenged as unreasonable and unlawful."[19] The issue raised by these complaints is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

9. Also without merit is TUECA's claim that even if AT&T has shown that TUECA's rates were unjust and unreasonable, its damages claims must still fail because AT&T is required to establish what a just and reasonable rate would have been as a basis for a determination of damages. This argument was previously considered and rejected in the AT&T Damages Order.[20] AT&T has shown that it purchased services from TUECA at rates that produced earnings over and above TUECA's prescribed levels. TUECA, faced with the prospect of damages for violations of a binding rate-of-return prescription, cannot disavow the substantial flexibility afforded carriers to achieve their authorized rate of return. In effect, TUECA would have us require AT&T to do what TUECA was neither required nor apparently able to do, that is, establish the precise rates required to bring TUECA's earnings within authorized levels for each of its interstate access service categories. This is an unreasonable requirement to impose upon AT&T. Although the Commission's rate-of-return prescription afforded TUECA considerable leeway in setting its rates, it also bound TUECA to a maximum earnings limitation. The Commission previously determined in the AT&T Liability Order that a

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17 See AT&T Liability Order, 5 FCC Rcd at 149.

18 Id. at 146-47.

19 Id. at 147 (quoting Arizona Grocery v. Atchison, T.& S.F.R. Co., 284 U.S. 370, 384 (1932)).

20 See AT&T Damages Order, 8 FCC Rcd at 149. The Commission emphasized in that decision its authority to prescribe and enforce carriers' rates of return. The Commission also pointed out that the issue in a rate of return complaint proceeding is not whether individual rates are unlawful, but whether cumulative rates that produced earnings in excess of a prescribed rate of return are unjust and unreasonable. Accordingly, the Commission held that the Bureau had properly determined that it is appropriate, in measuring the damage caused by the defendants' rate-of-return violations, to look at the difference between the amount the complainant paid for the defendants' interstate access services and the amount it would have paid if the defendants had charged rates that produced returns within the Commission's prescribed levels. See also AT&T Liability Order, 5 FCC Rcd at 147 (discussing the Commission's authority under the Act to prescribe and enforce common carriers' rates of return).

violation of such a prescription constitutes a violation of the Act for which damages may lie. It is therefore appropriate and consistent with the Commission's rate-of-return regulatory scheme to look at earnings in excess of the Commission's prescribed rates of return as a starting point for assessing AT&T's damages claims.

10. Vitelco Factors. TUECA's reliance on Vitelco is misplaced. The court in Vitelco ruled only on the issue of whether, in the context of a Section 204 investigation, the Commission could find rates unjust and unreasonable when they had been in effect for only six months of the designated 24 month review or monitoring period.[21] In examining that issue, the court set forth factors for the purpose of determining whether a refund would be warranted under the Commission's Section 204 authority. The court in Vitelco did not address the Commission's authority to adjudicate complaints for damages under Section 208 of the Act. The instant proceeding does not involve our authority under Section 204 of the Act, and unlike the monitoring period in Vitelco, the rate-of-return monitoring period at issue here is the full two-year monitoring period established in our rate-of-return regulations. Furthermore, the Commission has previously rejected TUECA's contention that it should be given special consideration in a Section 208 rate-of-return proceeding because of the unique circumstances faced by TUECA's rural members.[22]

11. We also reject TUECA's other equitable arguments regarding impermissible windfall profits to AT&T if damages are awarded. TUECA's arguments in this regard were addressed in detail in the AT&T Damages Order[23] and require no further discussion here. Consistent with the Commission's decisions in the AT&T Damages Order and MCI Damages Order, we find TUECA's arguments with respect to "passing-on" to be equally unavailing. In rejecting this same argument, the Commission said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[24] The issue is not what AT&T has done in response to paying excessive rates, but whether AT&T has been damaged as a result of these excessive rates.

B. Damages and Interest

1. Damages

a. Contentions of the Parties

12. AT&T's damages claims rest primarily on the contention that the proper measure of damages incurred as a result of TUECA's rate-of-return prescription violations is the difference between the amounts AT&T

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21 Vitelco, 989 F.2d at 1237-40.

22 AT&T v. Central Telephone Co., 8 FCC Rcd 3546 n.69 (1993).

23 8 FCC Rcd at 1020-21.

24 AT&T Damages Order, 8 FCC Rcd at 1020; see also MCI Damages Order, 8 FCC Rcd at 1526.

actually paid TUECA for interstate access services during the January 1, 1991 through December 31, 1992 monitoring period and the amount it would have paid if TUECA's rates produced earnings that did not exceed the Commission's prescription.[25]

13. Under its damages approach, AT&T states that it should be awarded $2,254,000 from TUECA. According to AT&T, this amount represents its contributions to TUECA's excessive earnings. In deriving this amount, AT&T first calculated an estimate of what TUECA's net earnings would have been had it earned the maximum overall target rate of return plus buffer of 11.5%. AT&T then subtracted this amount from TUECA's actual net earnings as reported in TUECA's monitoring reports to determine TUECA's after-tax overearnings. The difference was then "grossed-up" to reflect tax adjustments and multiplied by AT&T's market share.[26] In addition, AT&T contends it is entitled to interest on the damages amounts, from January 1, 1993 through December 31, 1994, of $298,820.

14. AT&T adds that TUECA's claim that it has failed to allege and prove violations of the Act and actual damage as a result of those violations is unfounded. AT&T maintains that it has successfully shown injury and causation arising from its payment of excessive rates for services purchased from TUECA during the relevant period.[27] AT&T asserts that its damages are the excessive charges that it paid.

15. TUECA challenges AT&T's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the AT&T Orders. TUECA contends that even if AT&T has established liability, the Commission has no authority to award AT&T the damages it requests under the D.C. Circuit's decision in American Telephone & Telegraph Co. v. FCC[28] and a later decision by the Sixth Circuit in Ohio Bell Telephone Co. v. FCC.[29] TUECA contends that by

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25 AT&T Brief at 9.

26 Id. at Attachment 1.

27 AT&T Reply Brief at 2-7.

28 836 F.2d 1386 (D.C. Cir. 1988) (AT&T v. FCC). In AT&T v. FCC, the court invalidated the Commission's procedure designed to enforce its rate-of-return prescriptions through the automatic refund of carrier overearnings to customers.

29 949 F.2d 864 (6th Cir. 1991) (Ohio Bell). In Ohio Bell, the court, relying on AT&T v. FCC, vacated a Commission order that in the context of a strategic pricing investigation had directed refunds of LEC earnings in excess of the authorized rate of return for the special access category over a period of years. Ohio Bell, 949 F.2d at 874. The Sixth Circuit placed considerable weight on the statement in AT&T v. FCC indicating that the Commission viewed its rate-of-return prescription as both a floor and ceiling on carrier earnings. Ohio Bell, 949 F.2d at 873, citing AT&T v. FCC, 836 F.2d 1390. The Commission, however, has since clarified that it does not view a rate-of-return prescription as both a minimum and maximum:

simply basing its damages claims on a calculation of its prorated share of TUECA's overearnings, AT&T asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in AT&T v. FCC. TUECA maintains that such a result is expressly precluded by AT&T v. FCC as well as the court's decision in Ohio Bell.[30] TUECA argues that recasting what amounts to a "refund" as a "damage award" does not cure the deficiencies the court found with a procedure that effectively requires the automatic refund of carrier overearnings but does not permit carriers to recoup earning shortfalls. TUECA maintains that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act, but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.[31]

16. TUECA next contends that the Commission has no authority to order a refund retroactively apart from Sections 204 and 205 of the Act.[32] TUECA argues that under Ohio Bell and Illinois Bell Telephone Co. v. FCC,[33] the Commission cannot order refunds unless it has first suspended rates under Section 204 and issued an accounting order.[34] TUECA argues that if a carrier's rates are found to be unreasonable, the Act only allows for prospective relief under Section 205 of the Act if the procedures set forth in Section 204 of the Act have not been followed. TUECA further contends that any Commission order requiring a carrier to make refunds solely because the carrier has exceeded the authorized rate of return would constitute unlawful retroactive ratemaking.[35]

17. Finally, TUECA argues that AT&T's claims are barred in whole or in part by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints not based on

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> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcription Order, 5 FCC Rcd at 7532.

30 TUECA Brief at 9-10.

31 See id. at 12-13.

32 Id. at 10-11.

33 966 F.2d 1478 (D.C. Cir. 1992) (Illinois Bell).

34 TUECA Brief at 10.

35 Id. at 10-11.

overcharges.[36] According to TUECA, Section 415 bars the recovery of any damages where the complaint was filed more than two years after the occurrence of the alleged unlawful act.[37] TUECA maintains that applying the statute in this proceeding, the limitations period would have started to run at the time TUECA received the charges paid by AT&T.

b. Discussion

18. Refunds. TUECA's arguments are devoted primarily to attempting to persuade the Commission that AT&T's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to TUECA, militate against any award of damages to AT&T based on excessive earnings. TUECA argues, in effect, that the damages AT&T seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in AT&T v. FCC. We do not agree. We are concerned here with determining whether a particular customer, one that has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to TUECA's violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[38] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

19. AT&T v. FCC and Ohio Bell. We disagree with TUECA's claim that Ohio Bell and AT&T v. FCC compel us to dismiss AT&T's complaints. As the Commission emphasized in the AT&T Liability Order and reaffirmed in the AT&T Damages Order, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in AT&T v. FCC or the refund procedure in Ohio Bell, both of which resulted from rulemaking proceedings initiated at the Commission's discretion,

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36 Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after . . ." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

37 TUECA Brief at 14.

38 See Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 455 n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [parallel with § 208 of the Act] proceeding will be no different than that of a § 15(8)(a) [parallel with § 204 of the Act] proceeding in which the carrier fails to establish the reasonableness of the rate.

individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[39] The courts in AT&T v. FCC and Ohio Bell did not discuss private complaints for damages; they did not invalidate private actions for damages; and this analysis is not applicable to the different, separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the AT&T Liability Order that defendants have violated the Communications Act by earning in excess of a valid rate-of-return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Act and themselves liable for damages to the extent a complainant can establish that it was damaged as a result of the violation.[40]

20. Sections 204 and 205. We also reject TUECA's claims that the decision in Illinois Bell leaves the Commission with only Section 205 authority in the face of a violation of our rate-of-return prescription. As the Commission explained in the MCI Damages Order, Illinois Bell addresses the Commission's authority under Section 204, not Section 208 of the Act.[41] As discussed above, in both the AT&T Liability Order and the MCI Liability Order, the Commission held that AT&T v. FCC establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[42] The Commission stated that

> we are not persuaded by defendants' claims that earning in excess of prescribed rate of return does not violate that Act or, if it does, that the Commission is required to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of the amount during the period in question.[43]

The Commission found further that the holding in AT&T v. FCC did not apply to Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the

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39 See AT&T Liability Order, 5 FCC Rcd at 147.

40 Id. at 149.

41 MCI Damages Order, 8 FCC Rcd at 1524-25.

42 AT&T Liability Order, 5 FCC Rcd at 147; MCI Liability Order, 5 FCC Rcd at 222-23.

43 MCI Liability Order, 5 FCC Rcd at 223 (emphasis in original).

burden of establishing both a violation of the Act and the actual injury.[44]

21. Retroactive Ratemaking. The Commission held in the AT&T Liability Order that enforcement of a rate-of-return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[45] TUECA has not persuaded us to alter our decision.

22. Statute of Limitations. AT&T is correct in its assertion that it had until two years after the filing of TUECA's monitoring reports within which to file its complaints.[46] The Commission has previously held that the date of the filing of the final monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.[47] TUECA has made no argument that persuades us to alter this holding. Section 415 does not bar AT&T's complaint.

23. Damages Award. We have carefully reviewed the arguments and evidence presented by the parties, including the calculations provided in Attachment 1 to AT&T's brief and we note that TUECA did not challenge those calculations. We find that AT&T has made a persuasive showing that it is entitled to recover the excessive amount it paid for TUECA's overall interstate access service and that this excessive amount totals $2,254,000 for the 1991-1992 monitoring period. We now turn to AT&T's claims for interest on the damages amounts.

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44 AT&T Liability Order, 5 FCC Rcd at 147.

45 Id.

46 AT&T Reply Brief at 10.

47 In the AT&T Liability Order the Commission stated:

> the defendant filed the rate of return monitoring reports which . . . was developed by the Commission for several purposes, including making information about carrier earnings publicly available. Moreover, the monitoring report relied on by AT&T in its complaint was specifically designated by the Commission as a "final" and conclusively binding determination of a carrier's earnings.

5 FCC Rcd at 148. We note further that, the Commission has held that Section 415(e) is inapplicable to the type of complaint we deal with here. See MCI Reconsideration Order, 5 FCC Rcd at 3464. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaint deals with the lawfulness of defendant's rates, not defendant's transmissions or obligations to transmit messages properly.

2. Interest on Damages

a. Contentions of the Parties

24. AT&T contends that it should be awarded interest on damages calculated at the IRS rate used for tax overpayments compounded daily.[48] TUECA does not contest the Commission's authority to award interest in a Section 208 common carrier complaint proceeding.

b. Discussion

25. Since 1993, the Commission's policy has been to award daily compounded interest computed at the IRS rate for tax overpayments.[49] We are persuaded that daily compounded interest fairly compensates aggrieved parties for the value of money owed. Therefore, we find that interest on the damages awarded here should be computed at the IRS rate for tax refunds, compounded daily, from January 1, 1993, the day after the relevant 1991-1992 rate-of-return monitoring period ended, until the date full payment is made to the complainant.[50]

V. CONCLUSION

26. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that the complainant is entitled to an award of damages, plus accumulated interest, compounded daily, on such damages, for TUECA's violations of the Commission's rate-of-return prescription for the 1991-1992 monitoring period.

VI. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208, and 209 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206, 207, 208, and 209, that the above referenced complaint IS GRANTED to the extent indicated above.

28. IT IS FURTHER ORDERED that the Telephone Utilities Exchange Carriers Association et al., SHALL PAY to the American Telephone and Telegraph Company the sum of $2,254,000 (two million, two hundred fifty-four thousand dollars) within 60 days after the release date of this Memorandum Opinion and Order.

29. IT IS FURTHER ORDERED that the Telephone Utilities Exchange Carriers Association et al., SHALL PAY to the American Telephone and Telegraph Company interest, compounded daily, on the damages awarded here

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48 AT&T Brief at 10-11.

49 See Competitive Telecommunications Ass'n v. The Chesapeake and Potomac Tel. Cos., 8 FCC Rcd 5550, 5553 (1993) and Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period, 8 FCC Rcd 5485, 5495 (1993).

50 The applicable IRS rates are set forth in Appendix A.

computed at the IRS rates set forth in Appendix A from January 1, 1993 until the date full payment is made.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Effective Period	Rate	Internal Revenue Service Citation
01/01/93 - 03/31/93	6%	Rev.Rul. 92-110, 1992-52 I.R.B. 15
04/01/93 - 06/30/93	6%	Rev.Rul. 93-24, 1993-14 I.R.B. 5
07/01/93 - 09/30/93	6%	Rev.Rul. 93-40, 1993-23 I.R.B. 9
10/01/93 - 12/31/93	6%	Rev.Rul. 93-63, 1993-30 I.R.B. 40
01/01/94 - 03/31/94	6%	Rev.Rul. 93-94, 1993-42 I.R.B. 42
04/01/94 - 06/30/94	6%	Rev.Rul. 94-21, 1994-14 I.R.B. 14
07/01/94 - 09/30/94	7%	Rev.Rul. 94-39, 1994-26 I.R.B. 9
10/01/94 - 12/31/94	8%	Rev.Rul. 94-58, 1994-39 I.R.B. 6
01/01/95 - 03/31/95	8%	Rev.Rul. 95-15, 1995-9 I.R.B. 9

Before the
Federal Communications Commission FCC 95-178
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	PR Docket No. 92-257
Rules Concerning Maritime	)	RM 7956
Communications	)	

FIRST REPORT AND ORDER

Adopted: April 26, 1995 **Released:** May 26, 1995

By the Commission:

I. INTRODUCTION

1. In a Notice of Proposed Rule Making and Notice of Inquiry (NOI)[1], adopted November 5, 1992, we began a proceeding to review thoroughly the present and future requirements of maritime communications. This First Report and Order addresses the proposals made in the Proposed Rule Making portion of the NOI. It amends Parts 2, 63, 80 and 90 of the Commission's Rules, 47 C.F.R. Parts 2, 63, 80 and 90, to authorize private land mobile sharing of certain maritime VHF frequencies and to reclassify international public coast stations as non-dominant common carriers. The rules adopted herein allow use of certain marine VHF channels in land-locked areas and streamline the regulatory procedures for public coast stations.

II. DISCUSSION

A. Private Land Mobile Use of Marine Frequencies

2. The Council of Independent Communication Suppliers (CICS) filed a Petition for Rule Making on March 6, 1992, proposing to permit private land mobile Industrial and

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[1] See Notice of Proposed Rule Making and Notice of Inquiry, PR Docket 92-257, 7 FCC Rcd 7870 (1992).

Land Transportation (I/LT) service operations within the marine VHF (156-162 MHz) band.[2] In the NOI, the Commission proposed rules allowing marine VHF public correspondence channels 24-28 and 84-87[3] to be used on a co-primary basis by eligibles in the I/LT radio services for base/mobile operations in areas more than 88 kilometers (55 miles) from navigable waterways and existing co-channel public coast stations.[4] Additionally, we sought specific comments regarding the protection of future public coast station expansion, the required use of narrowband equipment,[5] and the implications of our pending proposal to "refarm" certain private land mobile spectrum.[6] Commenters focused on two general areas of concern, sharing and separation criteria.

3. In summary, we will allow I/LT eligibles to share marine VHF public correspondence channels 24-28 and 84-87 on a primary basis within the 48 contiguous states far from navigable waterways and existing VHF public coast stations, in accordance with a revised minimum separation matrix. Additionally, we will allow sharing of the above channels on a secondary, non-interference basis in areas near navigable waterways, but far from VHF public coast stations. I/LT applications for this spectrum must be coordinated by the Commission certified frequency coordinator for their radio service.[7]

4. Primary Sharing. American Commercial Barge Lines Company and Waterway

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[2] I/LT eligibles are defined by 47 C.F.R. Part 90, Subparts D (Industrial Radio Service) and E (Land Transportation Radio Service). The Business Radio Service, 47 C.F.R. § 90.75, is a subservice of the Industrial Radio Service. CICS's petition (RM-7956), which was placed on public notice April 2, 1992, excluded the Business Radio Service, as did our proposal in the NOI.

[3] Marine VHF public correspondence channels 24-28 and 84-87 are duplex pairs within the 157.200-157.400 MHz and 161.800-162.000 MHz bands.

[4] Public coast stations provide interconnected public correspondence service to ships at sea. See 47 C.F.R. § 80.371(c) and NOI at paragraph 41. The term "navigable waterway" is defined in 33 C.F.R. § 2.205-25 and will be incorporated into the Commission's rules by reference in the final rules.

[5] The mandatory use of narrowband equipment in the marine VHF band will be addressed in a future rule-making proceeding.

[6] See PR Docket No. 92-235, 7 FCC Rcd 8105 (1992).

[7] See 47 C.F.R. § 90.175. Regarding our pending "refarming" proceeding wherein we proposed, inter alia, to reclassify the 26 private land mobile radio services into several broad licensing categories, we clarify that only those applicants eligible for licensing in the I/LT radio services -- under the rules governing each subservice in force today -- are eligible for such sharing.

Communication System, Inc. (ACBL/WATERCOM), Mobile Marine Radio (MMR), and the Ohio River Company (ORCO) claim that such sharing would not serve the public interest because public coast stations provide a safety service to the marine community and interference to public correspondence channels could prove detrimental to marine safety.[8] ACBL/WATERCOM's comments also note that most urban areas, where land mobile frequencies are congested, are also close to navigable waterways.[9] Therefore, according to ACBL/WATERCOM, the sharing of marine frequencies would hinder present or future maritime operations. ACBL/WATERCOM, the United States Coast Guard (USCG), and ORCO argue that sharing should only be allowed in major cities, far from waterways, such as Atlanta, Denver, Phoenix, and Dallas.[10]

5. ACBL/WATERCOM also opposes I/LT sharing on a primary basis because public coast stations provide a common carrier service to the marine community.[11] ACBL/WATERCOM claims that no other common carriers, under the Commission's rules, are forced to share frequencies with non-common carrier licensees. Additionally, Global Maritime Communication Systems, Inc. and Ross Engineering Company (GMSCI/REC) maintain that allowing I/LT eligibles to achieve primary status on these frequencies will hinder future public coast station expansion.[12] Further, several commenters argue that the "refarming" of private land mobile spectrum may make more land mobile frequencies available to the I/LT services, thus decreasing congestion and making the sharing of marine frequencies unnecessary.[13] Finally, Alascom, Inc. (Alascom) opposes the sharing of marine VHF frequencies in central Alaska because it uses these frequencies for control of oil flow blocking valves at 94 unattended stations along the Trans-Alaska oil pipeline.[14] Alascom states that these frequencies must be guarded from interference in the interest of health, safety, and environmental protection.

6. USCG, the Industrial Telecommunications Association, Inc. and CICS (ITA/CICS), the Utilities Telecommunications Council (UTC), and SEA, Inc. (SEA) each

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[8] ACBL/WATERCOM comments at 13, MMR comments at 16, ORCO comments at 9.

[9] ACBL/WATERCOM comments at 14.

[10] ACBL/WATERCOM comments at 15, MMR comments at 15, ORCO comments at 7. and USCG reply comments at 2.

[11] ACBL/WATERCOM comments at 13.

[12] GMSCI/REC comments at 4.

[13] ACBL/Watercom comments at 15, GMSCI/REC comments at 4, MMR comments at 16. and ORCO comments at 9-10.

[14] Alascom comments at 1.

support the proposal to allow I/LT sharing of these channels. Specifically, ITA/CICS and UTC argue that additional I/LT channels are needed in land-locked areas of the country where there are no marine users.[15] Further, the USCG and SEA agree that such sharing can promote spectrum efficiency, but emphasize the need for careful evaluation of separation criteria to prevent interference to maritime communications.[16]

7. As we stated in the NOI, inter-service sharing has been successfully used in the past to increase spectrum efficiency. The comments do not lead us to conclude that such sharing will be detrimental to present or future marine public coast station operations. We believe the safeguards we are adopting, such as increasing the separation criteria,[17] are sufficient to protect marine operations. For example, such sharing will not take place within public coast station service areas. Marine channels would be available to I/LT eligibles only in areas far removed from currently licensed public coast stations. Further, to protect future public coast stations, I/LT operations must be removed the same distance from navigable waterways[18] as they must be from existing public coast stations. We agree that "refarming" may provide some long term relief to private land mobile congestion problems. This alone, however, is not a sufficient reason to preclude the immediate benefits associated with inter-service sharing. For these reasons, we are adopting rules to allow I/LT eligibles to share certain VHF public correspondence channels on a primary basis far from public coast stations and navigable waterways. Finally, to protect Alascom operations, we are limiting I/LT sharing of these channels to the 48 contiguous states.

8. Three commenters propose that the Commission extend the sharing of marine channels to certain private land mobile eligibles other than I/LT entities. For example, the Associated Public-Safety Communications Officers, Inc. (APCO) and the Forestry-Conservation Communications Association urge the Commission to make a portion of the shared channels available on a primary basis exclusively for Public Safety Radio Service (Public Safety) eligibles.[19] APCO argues that there is a need for wide-area VHF Public Safety systems in remote mountain and rural areas. Additionally, APCO notes that there are a number of Public Safety licensees currently operating by waiver on certain marine VHF

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[15] ITA/CICS comments at 4, ITA/CICS reply comments at 13, UTC comments at 4, and UTC reply comments at 3.

[16] USCG reply comments at 2, SEA comments at 12.

[17] ¶ 11 infra.

[18] Note 4, supra.

[19] APCO comments at 2 and FCCA comments at 2.

public correspondence channels.[20] APCO emphasizes the need to provide sharing just for Public Safety eligibles on a portion of the proposed shared channels, generally referencing the statutory objective of promoting safety of life and property through the use of the radio spectrum. Further, the National Association of Business and Educational Radio, Inc. (NABER) recommends that the Commission extend the scope of its sharing proposal to include all private land mobile radio service users, including Business and Public Safety eligibles.[21] ITA/CICS claims, however, that widening the scope of our proposal to include Business and Public Safety eligibles could create more congestion on the shared frequencies because of the large number of entities who qualify for licenses in these services.[22] Additionally, ITA/CICS and the UTC point out that sharing among a smaller group of licensees would be easier to administer and enforce.[23]

9. The issue here is whether to open up sharing of nine channels to all private land mobile users on a routine basis at this time. While experience has shown that inter-service sharing can work, we believe it best, especially in cases involving a safety service such as the maritime service, to go slowly initially. Additionally, with only nine channels available, we do not think it is a good idea to divide them among several different land mobile entities as suggested by APCO. The I/LT service appears to be an ideal candidate to share these frequencies because many of these licensees operate in rural areas far from navigable waterways.[24] Also, unlike most public safety operations, I/LT communication requirements may be able to tolerate licensing on a secondary basis.[25] Finally, CICS's original petition in this proceeding provided both a showing of need and engineering data supporting I/LT sharing. Therefore, we will limit sharing to I/LT entities for the present time. After we gain experience in sharing marine channels with I/LT licensees on a routine basis,

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[20] APCO comments at 2. Several waivers have been granted for Local Government Radio Service licensees to use maritime frequencies in areas located far from waterways. Additionally, certain public safety licensees, licensed before June 30, 1958, are grandfathered under a footnote to the United States Table of Frequency Allocations, 47 C.F.R. § 2.105 n. US266, and operate on 157.35 MHz and 161.85 MHz, on the condition that they do not cause harmful interference to stations in the maritime services.

[21] NABER reply comments at 4.

[22] ITA/CICS comments at 4.

[23] UTC comments at 4.

[24] According to ITA/CICS, 70% of all I/LT licensees are located in rural areas far from navigable waterways. See ITA/CICS reply comments at 4.

[25] Because of the urgent nature of public safety communications, it would not be prudent to permit most public safety eligibles to share public correspondence frequencies on a secondary basis. See ¶ 13, infra.

we may revisit the issue of expanded sharing with other private land mobile eligibles.

10. Separation criteria. In the NOI, we proposed a matrix which listed the required minimum distances between future I/LT base stations, navigable waterways, and co-channel public coast stations. Upon taking into account issues such as mobiles operating on the fringe of a coast station's service area, station antenna heights, and transmitter powers, the minimum distances in the matrix increased proportionally with I/LT antenna height and transmitter power from 88 kilometers (55 miles) to 158 kilometers (99 miles).[26]

11. Four commenters, however, argue that these minimum distances are too short and will result in interference to maritime operations.[27] MMR's comments include an engineering study which generally supports the Commission's method of determining these minimum separation distances.[28] MMR suggests, however, that the antenna height for I/LT mobiles should be assumed as ten feet, not six feet above ground level (AGL), thereby increasing the proposed required minimum separation distances.[29] Additionally, MMR questions the Commission's proposal to protect only a 43 kilometer (27 mile) service area for public coast stations. Further, MMR and ORCO maintain that the proposed frequency pairs must be reversed, allowing I/LT base stations and public coast stations to transmit on the same frequencies.[30]

12. We agree with MMR that the antenna height of some vehicles may exceed six

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[26] The distances in the matrix were derived using the propagation curves specified in 47 C.F.R. § 80.767, assuming non-overlap of the 14 dBu interference contour of a proposed I/LT station with the 26 dBu service contour of any existing public coast station. The 26 dBu service contour is the sum of the current 17 dBu contour and a 9 dB antenna height correction factor. See note 26 infra. The interfering contour is 12 dB less than the service contour, as required by 47 C.F.R. § 80.773. The 26 dBu public coast station service contour was calculated assuming a 30 meter (100 foot) public coast station antenna height and a transmitting power of 100 Watts effective radiated power (ERP).

[27] ACBL/Watercom comments at 14, MMR comments at 17, NMEA comments at 10, and ORCO comments at 8.

[28] MMR supplement to comments, engineering study by Dr. George L. Schrenk of COMPCOMM Inc.

[29] The VHF propagation curves found in 47 C.F.R. § 80.767 assume antennas to be 30 feet above ground for mobiles, which is accurate for stations in the maritime services. In the private land mobile services, however, mobile antenna heights are generally assumed to be lower. Therefore, a correction factor is needed to allow the VHF propagation curves to model propagation distance when lower mobile antennas are assumed.

[30] MMR comments at 18, ORCO comments at 9.

feet AGL. For years, however, the typical antenna height of a vehicle operating in the Private Land Mobile Service has been assumed to be six feet AGL.[31] Therefore, we are using a six foot height with a 9 dB correction factor as proposed in the NOI. We agree with MMR's arguments regarding the proposed public coast station protected service area and the proposed frequency pairings. As a result of a staff survey analyzing current public coast stations' antenna heights and transmitter powers, we have increased our assumed service area for public coast stations from 43 kilometers (27 miles) to 71 kilometers (44 miles).[32] Hence, the minimum required distances in the matrix for co-channel operation[33] increase proportionally with I/LT antenna height and transmitter power from 116 kilometers (72 miles) to 187 kilometers (116 miles).[34] Further, we are reversing the I/LT base/mobile transmit frequency assignments, as was suggested by MMR and ORCO.

13. Secondary Sharing. Although primary sharing will promote more efficient use of marine frequencies in certain inland areas, the required separation from navigable waterways would effectively prevent coastal sharing even in cases far from co-channel VHF public coast stations. In their reply comments, ITA/CICS also support the sharing of these channels on a secondary, non-interference, basis in areas that meet the required separation from co-channel public coast stations, but not to navigable waterways.[35] Such sharing would be secondary to future public coast station operations. MMR, however, argues that the beneficial implementation of this type of proposed sharing must be on a mutually non-interfering basis.[36]

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[31] See, e.g., Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974).

[32] The 26 dBu public coast station service area contour was recalculated by using the propagation curves found in 47 C.F.R. § 80.767, assuming a 120 meter (395 foot) public coast station antenna height and a transmitting power of 100 Watts ERP.

[33] We recognize that the Commission's final decision in the "refarming" proceeding may change specific frequency assignments for I/LT users. Therefore, assignments offset from marine public correspondence channels, but still within the authorized marine bandwidth, will be considered co-channel.

[34] The distances in the matrix were derived as described in note 23, supra., using the recalculated public coast station service area, which increased from 43 kilometers (27 miles) to 70 kilometers (44 miles). Thus, the minimum separation distances contained in the final rules are increased by 27 kilometers (17 miles) due to the change in assumed public coast station antenna height from 30 meters (100 feet) to 122 meters (400 feet). I/LT operations must also afford the same protection to grandfathered public safety licensees operating on 157.35 MHz and 161.85 MHz.

[35] ITA/CICS reply comments at 9.

[36] MMR comments at 4.

14. We agree with ITA/CICS in that allowing use of these marine channels on a secondary basis would increase sharing opportunities without negatively impacting future maritime operations. Therefore, we will allow I/LT sharing of certain public correspondence channels on a secondary basis where I/LT operations meet the required separation from public coast stations, but not the required separation from navigablewaterways.[37] The frequency coordinator must inform the applicant that the recommended frequency is secondary to present and future maritime operations. Additionally, the applicant must state in the application that he or she is aware that such shared channels are available only on a secondary basis and that the station must cease operation upon notification by the Commission that the station is causing harmful interference to any existing or future co-channel maritime operation.[38]

B. Reclassification of Public Coast Stations as Non-Dominant Common Carriers

15. MMR and WATERCOM (Petitioners) jointly filed a petition asking the Commission to classify maritime mobile service providers as non-dominant common carriers.[39] COM/NAV Marine, Inc. filed supporting comments.[40] We note as a preliminary matter, the USCG's determination that it "does not believe [petitioners' proposal] will adversely affect safety of life at sea."[41]

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[37] Individual waiver requests will be considered in cases where proposed I/LT operations do not meet the required separation from public coast stations. Such a waiver request must show for each public coast station within 182 kilometers (113 miles) of the proposed I/LT base station: a) the non-overlap of the 26 dBu coast station service contour with the 14 dBu I/LT station interference contour, and b) the non-overlap of the 26 dBu I/LT station service contour with the 14 dBu coast station interference contour.

[38] Secondary I/LT operations must also afford the same protection to grandfathered public safety licensees operating on 157.35 MHz and 161.85 MHz.

[39] Petition for Determination of Non-Dominant Common Carrier Status filed February 1988 by Mobile Marine Radio, Inc. and Waterway Communications System, Inc. Petitioners are public coast station licensees that provide telegraphy services, comprised of Morse telegraphy, narrow-band direct-printing and radiofacsimile as well as MF, HF and marine VHF band radiotelephony service.

[40] COM/NAV Marine, Inc.'s comments summarize Petitioners' views. Although they were fully considered, they will not be separately discussed.

[41] See Letter from Chief, Telecommunications Systems Division, U.S. Coast Guard to Chief, Common Carrier Bureau, Federal Communications Commission, Washington, D.C. (May 1, 1989). The Coast Guard submitted its comments in response to a request from the Commission. In addition, the Coast Guard urged, inter alia, that prior notice of discontinuance of public coast stations be provided to the International Telecommunications Union, the appropriate Coast Guard Commander and the Defense Mapping Agency.

16. In the NOI, we defined certain public coast stations as international carriers[42] and found that, under the "market power" test delineated in the Commission's International Competitive Carrier proceeding,[43] these public coast stations are non-dominant because they do not possess market power.[44] We noted that, nevertheless, international public coast stations are currently subject to the full panoply of regulations applicable to international common carriers under Title II of the Communications Act.[45] We proposed, therefore, reclassifying international public coast stations as non-dominant common carriers, and noted that this would result in these stations being regulated under the streamlined rules available to other international non-dominant common carriers.[46] On the suggestion of MMR,[47] we also

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Licensees are currently required to provide notification of discontinuance to the Coast Guard "as soon as practicable." See 47 C.F.R. § 80.302.

[42] NOI at ¶ 33 and note 51. We clarify that only MF and HF band public coast stations are, per se, international carriers because only these stations communicate on the high seas, i.e. coastal waters beyond VHF range of the nearest land (approximately 25 nautical miles). See NOI at note 53. Higher band stations are international carriers only if, and then to the extent that, they engage in foreign communication as defined by the Act. See 47 U.S.C. § 153(f).

[43] International Competitive Carrier Policies, CC Docket No. 85-107, 102 FCC 2d 812 (1985). In this proceeding, we adopted standards for determining whether international carriers are dominant or non-dominant. We ruled, in short, that such carriers are dominant if they possess market power and non-dominant if they do not. We modeled these standards after those adopted previously for domestic carriers. Id. at ¶ 2 and note 3.

[44] NOI, ¶ 36, 7 FCC Rcd 7870 (1992).

[45] We recently reclassified all public coast stations as commercial mobile radio service (CMRS) providers. See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, ¶ 83 (1994) ("332 SRO"). We also exercised our authority to forbear, inter alia, from Section 203 (tariffs) and Section 214 (entry and exit) regulations for domestic CMRS. Id. at ¶¶ 165-182. We declined therein, however, to address forbearance for international CMRS. See id. at ¶ 126, note 261, and ¶ 182, note 369.

[46] Non-dominant international carriers, for example, may discontinue service to a geographic market on 120 days notice, 47 C.F.R. § 63.15, and filed tariffs may become effective 14 days after they are filed, 47 C.F.R. § 61.58(b). The Commission is reexamining tariff filing requirements for nondominant carriers following SWBell v FCC, No 93-1562, (DC Cir. January 20, 1995). See Public Notice, DA 95-428, released March 6, 1995.

[47] MMR, Further Comments (1991).

solicited comment on whether stations which provide landline telex services as well as maritime service should be treated differently from stations which provide only maritime services.

17. All seven commenters[48] addressing the issue of reclassification support our proposal to reclassify international public coast stations as non-dominant common carriers. Historically, as the commenters note, these stations were the only common carrier communication service available between land and vessels on the high seas. International public coast stations now, however, compete with satellite communications services, such as INMARSAT and, in a few markets, cellular telephone providers.[49] This increase in competition, while generally beneficial to the public, has made such substantial inroads to public coast station revenues as to threaten the existence of many public coast stations. This same increase in competition via new technologies[50] has eliminated whatever dominance public coast stations once had.

18. Three commenters responded to our questions about differential treatment for public coast stations affiliated with carriers who also provide landline telex services.[51] The essence of these comments is that public coast stations that provide landline services should be required to conduct their land and marine services separately to avoid cross-subsidization that would work to the detriment of exclusive maritime public coast stations.

19. We are unconvinced however, that imposing separate subsidiary requirements on public coast stations providing landline telex service would be in the public interest. As we have previously recognized in the context of Bell Operating Companies offering enhanced services, the imposition of structural separation may hurt consumers by creating inefficiencies

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[48] Marine Telephone Company, KFS World Communications, Inc., the National Marine Electronics Association, ACBL/WATERCOM, ORCO, MMR, and SEA, Inc.

[49] See, e.g., NOI at ¶ 35, 7 FCC Rcd 7870 (1992).

[50] Public coast station operations, under our rules, have not changed significantly over the past 50 years. Unlike, for example, competing satellite services wherein calls from vessels on the high seas are interconnected to the PSTN automatically, many public coast station calls are still interconnected manually. In a companion item, we are proposing additional changes to our rules governing public coast station operations. See Further Notice of Proposed Rule Making, PR Docket No. 92-257.

[51] See MMR, Comments at 13 (1993). KFS World Communications, Inc. (KFS), Comments at 11, MTC, Comments at 16.

and slowing or preventing the deployment of new services.[52] In addition, the imposition of separation requirements on firms providing service on an integrated basis might impose various transition costs on the integrated firm, and could result in service disruption and customer confusion.[53]

20. Balanced against these costs, we are unable to identify any benefits to be gained from the imposition of separation requirements on public coast stations integrated with landline telex providers. The only justification posited by commenters is that integrated public coast stations could allegedly use their landline telex revenue to cross-subsidize their public coast stations' operations. The risk that such a predatory pricing scheme could be implemented, much less successfully implemented, seems remote, at best, and certainly does not justify the imposition of the costs attendant to a structural separation scheme for integrated public coast firms.

21. The theory behind structural separation is that a regulated monopolist that also provides competitive services may have the incentive and ability to shift costs from its competitive business to its regulated business, thereby avoiding rate-of-return constraints. The imposition of separate subsidiary requirements therefore seeks to reduce the ability of dominant firms to engage in such predation or to do so without detection.[54] Here, however, no evidence is offered that landline telex is a dominant service that could be used by integrated public coast stations to create a predatory environment in the maritime communications marketplace. Quite to the contrary, we have previously recognized that telex services are non-dominant carriers, overlapping "in price, delivery time, and quality with other services."[55]

22. Moreover, even if integrated public coast stations had market power in a telex market, the three commenters posit a predatory pricing scheme that simply makes "no

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[52] Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services ¶ 37, Notice of Proposed Rulemaking, CC Docket No. 95-20, ___ FCC Rcd ___ (released Feb. 21, 1995).

[53] Id. at ¶ 40.

[54] See generally Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, 461-464 (1980).

[55] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore ¶ 22, Fourth Report & Order, 95 FCC 2d 554, 571-527, 575 (1983) (demand substitutes for domestic telex include: (1) domestic teletypewriter exchange services; (2) facsimile, sophisticated terminals, communicating word processors and other forms of record telecommunications; (3) private line voice and data services; and (4) switched voice services).

economic sense."[56] If integrated coastal stations priced their maritime services below cost, they would be foregoing profits, and in order for such an "investment for the future" to be rational, those coastal stations would have to have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses they suffered.[57] This appears implausible, for even if the maritime-only public coast stations were driven out of business, there would still remain strong competition for maritime business from cellular and satellite-based services, which apparently are strong enough to threaten the very existence of public coast stations. Therefore, such a predatory scheme would be doomed from the outset and it seems improbable that such a scheme would be pursued.[58]

23. Finally, public coast stations have been in existence for approximately 100 years,[59] and are the most mature players in the business of communications services for vessels in coastal waterways and offshore. Moreover, the number of public coast stations that provide landline telex service is relatively small. Thus, it seems likely that if integrated public coast stations that provide landline telex service engaged in strategic conduct abusing any market power they might have (as implausible as that seems), such competitive abuses could be readily detectable. In sum, the remedy that the three commenters propose -- that each public coast station that provides both maritime and landline telex services be required to create a separate subsidiary for their telex service -- would merely subject them to unnecessary regulation without providing any apparent benefits.

24. We also note that, under our decision herein, all international public coast stations remain subject to tariff and market-exit regulations.[60] Recently, by comparison, we exercised our authority to forbear from subjecting most domestic-CMRS licensees to such regulations. We then ruled that such domestic-CMRS licensees affiliated with local exchange carriers will not be required to conduct their businesses separately, i.e., structural separation.

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[56] See Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (defendants entitled to summary judgment where plaintiff advanced implausible predatory pricing scheme that made no economic sense).

[57] In evaluating possible predatory pricing schemes, courts have focused on the likelihood of recoupment -- thus, the firm must be able to sustain monopoly power for ample time to both recoup its losses and to harvest some additional gain. Id., 475 U.S. at 589.

[58] A predatory pricing scheme cannot be successful if entry into the market is so easy, or if the competitors that are not subject to the predation are so numerous, that a predator would not be able to recoup monopoly profits after its rival are vanquished. See, e.g., Northeastern Tel. Co. v. AT&T, 651 F.2d 76, 89 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982).

[59] Notice of Proposed Rulemaking and Notice of Inquiry ¶ 2, PR Docket No. 92-257, 7 FCC Rcd 7863.

[60] See 47 C.F.R. § 63.15.

but will be subject to certain accounting safeguards.[61] If, in the future, we similarly forbear from regulating international public coast stations, we would consider adopting similar accounting safeguards, as appropriate.

25. We find, in summary, that reclassifying international public coast stations as non-dominant common carriers will serve the public interest by promoting competition.[62] We believe that the advantages of increased competition coupled with the threat of potential Commission action and the difficulty of concealing anti-competitive practices, are sufficient to deter unfair competitive practices in the public coast station market. Therefore, we are amending the rules to classify all public coast stations as non-dominant common carriers that will be treated under streamlined regulatory procedures.

III. CONCLUSION

26. Accordingly, we are amending Parts 2, 80, and 90 of the Rules to provide for private land mobile sharing of certain marine VHF public correspondence frequencies. We are also amending Part 63 of the Rules to reclassify public coast stations as non-dominant common carriers. These actions will serve the public interest by promoting the rapid development of new services and the increased use of state-of-the-art radio communication technologies and better serve the maritime and land mobile customers by increasing the efficiency of spectrum usage and minimizing the regulatory burden on marine communications providers while having no negative impact on the public safety or efficiency of communications.

27. Finally, we are adopting two nonsubstantive editorial corrections to the table in Section 80.373(f) of the Commission's Rules. 47 C.F.R. § 80.373(f). Because the editorial rule amendments adopted herein are minor and noncontroversial in nature, we find that there is good cause to not comply with the notice and comment provisions of the Administrative

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[61] See 332 SRO, at ¶ 218, note 45 supra.

[62] AT&T's international public coast station service that is offered through its high seas tariff is an international MTS service within price cap Basket 1. See AT&T Tariff No. 1, Section 3.3, page 67. The NOI did not specifically address the issue of AT&T's service and its treatment under price caps. Consequently, parties may not have been given adequate notice that a change in the rules for public coast stations would affect the services or status of AT&T which is subject to special regulatory oversight as the only dominant interexchange carrier. We also do not have the type of evidence in the record that we have in other cases examined in order to determine whether any AT&T service should be moved from price cap regulation to streamlined regulation. For these reasons, AT&T's status remains unchanged by this rule making. AT&T, however, may petition the Commission to treat its international public coast station service like other public coast station services affected by this Order, as a nondominant service subject to streamlined regulation.

Procedure Act. See 5 U.S.C. § 553(b)(3)(B).

IV. FINAL REGULATORY ANALYSIS

28. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This First Report and Order authorizes sharing of certain frequencies in the Maritime Service by land mobile users, and reclassifies marine public coast stations as non-dominant common carriers. Authorizing sharing of maritime frequencies will improve the efficiency of spectrum use, and reclassifying public coast stations as non-dominant common carriers will help to avert the cessation of operations by these stations by reducing their regulatory burden, while at the same time ensuring competition in the maritime communications market.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

No significant alternative to this action was contained in the NOI or suggested by commenters. The action represents the best means to achieve the regulatory objective of minimizing the regulatory burden on the public.

V. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i), 303(r), and 307(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 307(c), Parts 2, 63, 80 and 90 of the Commission's Rules, 47 C.F.R. Parts 2, 63, 80 and 90 ARE AMENDED as set forth below.

30. IT IS FURTHER ORDERED that this First Report and Order will be effective thirty days after publication in the Federal Register.

31. For further information contact Roger S. Noel, Wireless Telecommunications Bureau, Private Wireless Division, telephone (202) 418-0680, mail stop 2000F.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachment

FINAL RULES

Chapter I of Title 47 of the Code of Federal Regulations, Parts 2, 63, 80, and 90 are amended as follows:

I. Part 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Secs. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106 is amended by adding land mobile allocations to the United States table, non-government section (column 5) and FCC use designators section(column 6), in the 157.1875-157.45 MHz and 161.775-162.0125 MHz bands and adding one non-government footnote, to read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * * * *

International table			United States table		FCC use designators	
Region 1-allocation MHz (1)	Region 2-allocation MHz (2)	Region 3-allocation MHz (3)	Government Allocation MHz (4)	Non-Government Allocation MHz (5)	Rule Part(s) (6)	Special-use frequencies (7)
*	*	*	*	*	*	*
			157.1875-157.45 MARITIME MOBILE LAND MOBILE 613 US223 US266 NG111 NG154		MARITIME (80) PRIVATE LAND MOBILE (90)	
			*		*	
			161.775-162.0125 MARITIME MOBILE LAND MOBILE 613 US266 NG6 NG154		DOMESTIC PUBLIC LAND MOBILE (22) MARITIME (80) PRIVATE LAND MOBILE (90)	
			*		*	

NG154 The 157.1875-157.45 MHz and 161.775-162.0125 MHz bands are also allocated to the land mobile service for assignment to stations as described in Part 90 of this chapter.

* * * * *

II. Part 63 - EXTENSION OF LINES AND DISCONTINUANCE OF SERVICE BY CARRIERS AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. The table of contents for Part 63 is amended by deleting Sections 63.64, 63.69, and 63.70.

2. The authority citation for Part 63 continues to read as follows:

AUTHORITY: Sec. 4, 48, Stat. 1066, as amended 47 U.S.C. 154. Interpret or apply sec. 214, 48 Stat. 1075, as amended; 47 U.S.C. 214.

3. Section 63.62 is amended by revising the initial paragraph, deleting paragraph (e) and redesignating paragraphs (f) and (g) as (e) and (f) respectively to read as follows:

§ 63.62 Type of discontinuance, reduction, or impairment of telephone or telegraph service requiring formal application.

* * *except as provided in paragraph (c) of this section, or in emergency cases* * *

* * * * *

4. Sections 63.64, 63.69 and 63.70 are deleted.

5. Section 63.90 is amended by revising paragraph (a) to read as follows:

§ 63.90 Publication and posting of notices.

(a) Immediately upon the filing of an application or informal request (except a request under § 63.71) for authority to close or otherwise discontinue the operation, or reduce the hours of service at a telephone exchange (except an exchange located at a military establishment), the applicant shall post a public notice at least 51 cm by 61 cm (20 inches by 24 inches), with letter of commensurate size, in a conspicuous place in the exchange affected, and also in the window of any such exchange having window space fronting on a public street at street level. Such notice shall be posted at least 14 days and shall contain the following information, as may be applicable:

(1) * * *

* * * * *

III. Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.5 is amended by adding a new paragraph in alphabetical order to read as follows:

§ 80.5 Definitions.

* * *

Navigable Waters. This term, as used in reference to waters of the United States, its territories and possessions, means the waters shoreward of the baseline of its territorial sea and internal waters as contained in 33 C.F.R. § 2.05-25.

* * * * *

3. In Section 80.371, the table listed in paragraph (c) is amended by modifying the table, adding Footnote 4, to read as follows:

§ 80.371 Public correspondence frequencies.

* * * * *

(c) * * *

Working Carrier Frequency Pairs in the 156-162 MHz Band[1,4]

* * * * *

[4] Except for the frequency pair 157.425/162.025 MHz, these frequencies may be shared with stations in the private land mobile radio service, within the 48 contiguous states, under the terms of operation described in § 90.283 of this chapter.

* * * * *

4. In Section 80:373(f), the first column of the table is revised by redesignating the references to Footnotes 14 and 15 as 15 and 16 respectively for channels 09 and 70, to read as follows:

§ 80.373 Private Communications Frequencies.

* * * * *

(f) * * *

Frequencies in the 156-162 MHz Band			
Channel designator	Carrier frequency (MHz)		Points of communication (between coast and ship unless otherwise indicated)
	Ship transmit	Coast transmit	
* * *			
Digital Selective Calling			
70[15]	156.525	156.525	
Noncommercial			
* * *			
09[16]	156.450	156.450	
* * * * *			

IV. Part 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.

2. Section 90.7 is amended by adding a new paragraph in alphabetical order to read as follows:

§ 90.7 Definitions.

* * *

Navigable Waters. This term, as used in reference to waters of the United States, its territories and possessions, means the waters shoreward of the baseline of its territorial sea and internal waters as contained in
33 C.F.R. § 2.05-25.

3. Part 90 is amended by adding a new Section 90.283 under Subpart K to read as follows:

§ 90.283 Inter-service sharing of maritime frequencies in the 156-162 MHz band.

(a) The following frequency pairs may be assigned to any station eligible for licensing in the Industrial and Land Transportation Radio Services (subparts D and E of this Part excluding § 90.75) for duplex operation within the 48 contiguous states in accordance with the rules of their individual services, the conditions set forth in this section, and the CANADA/U.S.A. channeling agreement for VHF maritime public correspondence found in § 80.57 of this chapter.

Frequency (MHz)	
Mobile Station Transmit	Base Station Transmit
157.200	161.800
157.225	161.825
157.250	161.850
157.275	161.875
157.300	161.900
157.325	161.925
157.350	161.950
157.375	161.975
157.400	162.000

(b) Assignment will be made only when VHF frequencies available for assignment under this Part are unavailable due to congestion, as determined by a certified private land mobile frequency coordinator. Applicants must provide evidence of frequency coordination in accordance with § 90.175.

(c) Station power, as measured at the output terminals of the transmitter, must not exceed 50 watts for base stations and 20 watts for mobile stations. Antenna height (HAAT) must not exceed 122 meters (400 feet) for base stations and 4.5 meters (15 feet) for mobile stations. Such base and mobile stations must not be operated on board aircraft in flight.

(d) The following table, along with the antenna height (HAAT) and power (ERP), must be used to determine the minimum separation required between proposed base stations and each of the following: i) co-channel public coast stations licensed under Part 80 of this chapter. ii) the coastline of any navigable waterway, iii) grandfathered public safety licensees operating on 157.35 MHz or 161.85 MHz. Applicants whose exact ERP or HAAT are not reflected in the table must use the next highest figure shown.

REQUIRED SEPARATION IN KILOMETERS (MILES) OF BASE STATION FROM COASTLINES/PUBLIC COAST STATIONS

Base Station Characteristics					
HAAT	ERP (watts)				
meters (feet)	400	300	200	100	50
15 (50)	138 (86)	135 (84)	129 (80)	121 (75)	116 (72)
30 (100)	154 (96)	151 (94)	145 (90)	137 (85)	130 (81)
61 (200)	166 (103)	167 (104)	161 (100)	153 (95)	145 (90)
122(400)	187 (116)	177 (110)	183 (114)	169 (105)	159 (99)

(e) In the event of interference, the Commission may require, without a hearing, licensees of base stations authorized under this section that are located within 241 kilometers (150 miles) of an existing, co-channel public coast station, grandfathered co-channel public safety station or an international border to reduce radiated power, decrease antenna height, and/or install directional antennas. Mobile stations must operate only within radio range of their associated base station.

(f) Individual waiver requests to operate on a secondary, non-interference, basis will be considered in cases where the applicant's base station satisfies the requirements of paragraph (d)(i) and (iii) but does not satisfy the requirements of paragraph (d)(ii) of this section. All waiver requests must be submitted in accordance with § 1.931 of the chapter. Such secondary operations must cease immediately upon notification by the Commission that the station is causing interference to maritime operations.

4. Section 90.555 is amended by revising two of the service titles in paragraph (a) and by adding eighteen new frequencies in numerical order in paragraph (b) to read as follows:

§ 90.555 Combined frequency listing.

(a) * * *

Industrial Services (I)

* * *

Land Transportation Services (LT)

* * * * *

(b) * * *

Frequency	Services	Special Limitations
157.200.....	I,LT.....	See § 90.283
157.225.....	Do.....	Do.
157.250.....	Do.....	Do.
157.275.....	Do.....	Do.
157.300.....	Do.....	Do.
157.325.....	Do.....	Do.
157.350.....	Do.....	Do.
157.375.....	Do.....	Do.
157.400.....	Do.....	Do.
* * *		
161.800.....	I,LT.....	See § 90.283
161.825.....	Do.....	Do.
161.850.....	Do.....	Do.
161.875.....	Do.....	Do.
161.900.....	Do.....	Do.
161.925.....	Do.....	Do.
161.950.....	Do.....	Do.
161.975.....	Do.....	Do.
162.000.....	Do.....	Do.
* * * * *		

Before the
Federal Communications Commission FCC 95-181
Washington, D.C. 20554

In the Matter of	)	
	)	
Simplification of the	)	CC Docket No. 92-296
Depreciation Prescription	)	
Process	)	

Third Report and Order

Adopted: May 2, 1995 **Released:** May 4, 1995

By the Commission:

I. INTRODUCTION

1. On September 23, 1993, we adopted streamlined depreciation prescription procedures for the local exchange carriers ("LECs") regulated under our price cap incentive regulatory plan.[1] These procedures require us to establish ranges of acceptable values for the future net salvage and projection life estimates that are used to compute depreciation rates for plant categories.[2] The new procedures generally permit price cap LECs to make streamlined filings for changes

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[1] Simplification of the Depreciation Prescription Process, Report and Order, 8 FCC Rcd 8025 (1993) (Depreciation Simplification Order), petitions for recon. pending.

[2] Rates are determined by a depreciation rate formula:

$$\text{Depreciation Rate} = \frac{100\% - \text{accumulated depreciation}\% - \text{future net salvage}\%}{\text{average remaining life}}$$

This formula requires forecasting two parameters: future net salvage ("FNS") and average remaining life ("ARL"). The FNS is the estimated gross salvage of the plant less any estimated cost of removal. The ARL is the estimated average of the future life expectancy of investment in a particular plant account. The ARL is derived from two basic factors: a projection life and a survivor curve. The projection life is the life expectancy of new additions to plant, whereas the survivor curve describes the percentage of plant investment surviving at each age that the plant is in service. Id. at 8030.

in depreciation rates for these categories, as long as these estimates fall within the prescribed ranges. In our Second Report and Order in this proceeding,[3] we adopted underlying factor ranges for 22 depreciation rate categories. In this Third Report and Order, we establish streamlined procedures for the remaining 12 plant categories.

II. BACKGROUND

2. Prior to adoption of the Depreciation Simplification Order, the depreciation prescription process required carriers to submit extensive data to support the future net salvage, projection life, and survivor curve estimates underlying proposed depreciation rates.[4] These data requirements often resulted in voluminous submissions, consisting of up to 25 pages of analysis for each of 34 plant categories. In recognition of the regulatory, technological, and market changes that price cap LECs face, we decided to simplify the process by establishing ranges that specify maximum and minimum amounts for two of the underlying basic depreciation factors, the future net salvage and projection life estimates.[5]

3. Under our new process, if a price cap LEC meeting the requisite criteria[6] selects future net salvage and projection life estimates that are within the established ranges, it need not submit the detailed supporting data otherwise required.[7] In addition, under the new procedures, price cap LECs can change these basic factors annually, as opposed to being bound by the current triennial represcription cycle.[8] Any basic factor changes, however, must reflect carrier operations.[9] These streamlined procedures are intended to simplify the depreciation process,

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[3] Simplification of the Depreciation Prescription Process, Second Report and Order, 9 FCC Rcd 3206 (1994) (Second Report and Order).

[4] See Simplification of the Depreciation Prescription Process, Notice of Proposed Rulemaking, 8 FCC Rcd 146, 147 (1993).

[5] Depreciation Simplification Order, 8 FCC Rcd at 8026.

[6] There are two prerequisites for using the streamlined procedures. First, the basic factors underlying the price cap LEC's current depreciation rate for an account must be within the established ranges. If the basic factors are not within the established ranges, the price cap LEC must submit a full depreciation study to move the basic factors within the established ranges before it can use the streamlined procedures. Second, the basic factors proposed to be used for a new depreciation rate must also be within the established ranges. Id. at 8054-55.

[7] Id. at 8035, 8054-55. We delegated to the Common Carrier Bureau the authority to determine the filing requirements for accounts with basic factor values within the ranges we have set. Id. at 8054 n.129.

[8] Id. at 8054.

[9] "Prescribing depreciation rates that allocate plant costs over the useful life of plant is central to our depreciation policy. Thus, a carrier should use the basic factors that reflect its company operations." Depreciation Simplification Order, 8 FCC Rcd at 8054. The requirement that a new depreciation rate be consistent with carrier operations is designed to assure that carriers do not arbitrarily select life and salvage

achieve administrative savings, and allow the price cap LECs greater flexibility in the depreciation process, while continuing an appropriate oversight of their depreciation rates.[10]

4. We determined that the new, streamlined procedures should be implemented in two phases, beginning with the accounts most readily adaptable to the range approach. We have completed phase one of the streamlining process and adopted ranges for 22 plant categories.[11] On October 7, 1994, we initiated phase two by adopting a Further Order Inviting Comment proposing streamlined procedures for the 12 remaining plant categories.[12]

5. By this Third Report and Order, we are completing phase two by adopting ranges for eight of the remaining 12 categories and alternate simplified procedures for the other four.[13] With the adoption of this Order, we have now established ranges of projection life and future net salvage factors for 30 of the 34 plant categories representing 85% of the total plant investment.[14]

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estimates simply because they are within the prescribed ranges. Instead, carriers electing the new procedures must select life and salvage factors within the ranges that are consistent with their operations. A carrier's factors are considered to be consistent with its operations if the proposed depreciation rate results in the straight line depreciation of the service value over the average remaining life of the plant. 47 C.F.R. § 32.2000 (g)(1)(i). Generally, such determinations are made by analyzing the mix of assets in the carrier's account, studying historical retirement data, and considering expected retirements and additions to the account based on the carrier's construction and modernization plans.

[10] Id.

[11] See Second Report and Order, 9 FCC Rcd at 3211.

[12] Simplification of the Depreciation Prescription Process, Further Order Inviting Comments, 9 FCC Rcd 7651 (1994) (FOIC).

[13] In the Depreciation Simplification Order, we addressed such issues as the data, methodology and procedures to be used to establish, review and update the ranges, and eligibility criteria for using the ranges. Many of the parties filing in response to our FOIC included additional comments on these issues. Such comments are beyond the scope of this proceeding. To the extent these comments were also made by these parties in their petitions for reconsideration of the Depreciation Simplification Order, they will be considered as we analyze the petitions seeking modifications to that Order. In the paragraphs below, we address the issues raised by our FOIC.

[14] A total of 13 parties filed comments and reply comments. These parties include the Idaho Public Utilities Commission, the Missouri Public Service Commission, price cap LECs, GSA, MCI, NARUC, and USTA. Appendix A lists the parties filing each type of pleading as well as the short names this Order uses to refer to each of the parties.

III. DISCUSSION

A. Ranges for Eight Accounts

6. In the FOIC, we solicited comments on a specific set of proposed ranges for the future net salvage and projection life factors for eight of the remaining plant categories.[15]

1. Position of Parties

7. USTA and most of the LEC commenters urge the Commission to adopt the ranges so that the LECs can use them during the 1995 depreciation represcription process.[16] These commenters, however, give limited support to the ranges as proposed in the FOIC. They state that those ranges are based on "historical" data that are not forward looking.[17] In addition, they argue that the proposed projection life ranges encompass useful lives that are too long.[18]

8. GSA, MCI, and NARUC support the ranges proposed in the FOIC.[19] They state that the methodology the Commission used to determine the ranges is sound[20] and that the ranges are reasonable and should be adopted without modification.[21] MCI and NARUC further state that the proposed ranges appear to provide flexibility to a majority of the LECs, but are not so broad as to be meaningless.[22]

9. On the other hand, the Idaho Commission and the Missouri Commission contend that the ranges are based on inadequate data. They state that, while the data are useful for determining the depreciation factors for a specific company, they are not adequate to establish industry-wide

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[15] The remaining eight plant categories are: Digital switching; Operator systems - combined; Circuit equipment - digital; Poles; Aerial cable - metallic; Buried cable - metallic; Intrabuilding network cable - metallic; and Intrabuilding network cable - non-metallic. See Appendix B.

[16] Bell Atlantic Comments at 1; Southwestern Comments at 2; Pacific Comments at 1; United Comments at 1; USTA Comments at 1; U S WEST Comments at 6.

[17] Bell Atlantic Comments at 2-3; BellSouth Comments at 4-5; Pacific Comments at 3-4; Southwestern Comments at 5-6; USTA Comments at 3-4.

[18] Ameritech Comments at 2-3; Bell Atlantic Comments at 2-3; BellSouth Comments at 4; Pacific Comments at 3-4; Southwestern Comments at 5-6; United Comments at 2; USTA Comments at 3-4.

[19] GSA Reply Comments at 3-5; MCI Comments at 3; NARUC Comments at 4.

[20] GSA Reply Comments at 3-5; MCI Comments at 3; NARUC Comments at 3-4; NARUC Reply at 3.

[21] GSA Reply at 4,7; MCI Comments at 3; NARUC Comments at 3-4; NARUC Reply at 5.

[22] MCI Comments at 3; NARUC Comments at 4.

ranges.[23] The Missouri Commission and the Idaho Commission indicate that the proposed ranges are too wide and that the ranges could substantially increase the carriers' depreciation expense.[24] The Missouri Commission indicates that these ranges would give the price cap LECs discretion over approximately $1 billion in depreciation expense.[25] In addition, the Missouri Commission contends that the ranges' width should vary inversely with the size of the account so that the potential depreciation change would equal some "target discretion value." Thus, according to the Missouri Commission, accounts with large balances should have relatively small ranges and accounts with small balances should have relatively large ranges.[26]

2. Discussion

10. In the Depreciation Simplification Order, we set forth the specific methodology that should be used to establish the projection life and future net salvage ranges.[27] We have already used that methodology in establishing ranges for 22 depreciation rate categories in our Second Report and Order.[28] In this Order, we are again using that methodology to set ranges for eight additional plant categories. This methodology requires that we consider certain specifically enumerated data. To apply it for each account and for each of the two basic factors, we first developed a range of one standard deviation around the mean of the basic factors underlying the currently prescribed depreciation rates for each of the LECs. From that point, we determined whether there were technological trends or changing carrier plans that might not be fully reflected in some of the LECs' prescribed factors. We then considered the number of LECs with basic factors that fall within the initial ranges and altered the ranges where appropriate.[29] We recognized, however, that these specifically enumerated data must be considered in light of our obligation to prescribe reasonable depreciation rates:

> [we] wish to make the ranges wide enough to accommodate a significant number, if not all, of the LECs. On the other hand, we must not make the ranges so wide

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[23] Idaho Commission Reply at 1; Missouri Commission Comments at 4.

[24] Idaho Commission Reply at 1-2; Missouri Commission Comments at 2.

[25] Missouri Commission Comments at 2.

[26] Id. at 7.

[27] Depreciation Simplification Order, 8 FCC Rcd at 8050.

[28] See supra note 3.

[29] For example, for the circuit digital category (Account 2232.12), a life range of plus or minus one standard deviation about the mean would yield a 11.5 - 13 year life range, with 81% of the carriers falling within the range. Our decision to expand the range to 11 - 13 years resulted in 88.1% of the carriers falling within the range. Likewise, a salvage range of plus or minus one standard deviation about the mean would yield a 0% to 3% salvage range for this category, with 88.1% of the carriers falling within the range. By widening the range to 0% to 5%, 97.6% of the carriers would then fit within the range.

that they would no longer enable us to exercise effective oversight of depreciation rates.[30]

Thus, in developing the proposed ranges, we considered both the specific data enumerated in the Depreciation Simplification Order and our overriding responsibility to prescribe reasonable depreciation rates.[31]

11. After reviewing the comments, we have decided to adopt the ranges proposed in the FOIC.[32] As indicated above, these ranges are based on statistical studies of the most recently prescribed factors. These statistical studies required detailed analyses of each carrier's most recent plant retirement patterns, the carriers' plans, and the current technological developments and trends. Because the proposed ranges reflect these data, we do not believe that the ranges are too high, too low, or not accurate as several commenters contend. Moreover, the ranges are not so broad as to be considered meaningless by including all prescribed factors.

12. As we stated in the Second Report and Order, our objective in this rulemaking is to streamline the process used by the Commission to prescribe depreciation rates, not to change those rates.[33] We believe that the ranges adopted in this Order, and in the Second Report and Order, provide a reasonable degree of confidence that the basic factors falling within their bounds will produce depreciation rates accurately reflecting plant retirements, company plans, and technological trends. On the other hand, they allow the LECs sufficient flexibility in the selection of the final factors.[34] Consequently, we have decided not to deviate from any of the proposed ranges at this time. We believe that some experience with the ranges should be developed before we consider modifying them. As suggested by most of the commenters, this will also allow us to establish the ranges as quickly as possible so that the LECs can use them during the 1995 represcription process. If changing conditions require revisions in the ranges, we can modify them during our three-year range review.[35]

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[30] Depreciation Simplification Order, 8 FCC Rcd at 8049.

[31] In discussing the ranges, many of the commenters recommend that we consider other methodologies, criteria and data in establishing the ranges. For example, the LECs state that we should consider forward looking data rather than historical data and the Missouri Commission recommends that the ranges's width vary inversely with the size of the account. See supra paras. 5, 9. As stated above, these issues are beyond the scope of this FOIC, but will be addressed in the pending reconsideration of the Depreciation Simplification Order. See supra note 13.

[32] See Appendix B.

[33] Second Report and Order at 9 FCC Rcd 3209.

[34] See supra note 3.

[35] Depreciation Simplification Order, 8 FCC Rcd at 8058.

B. Four Accounts for Which Ranges Were Not Proposed

13. In the FOIC, we did not propose ranges for Account 2211, Analog Electronic Switching; Account 2215, Electro-mechanical Switching; and Account 2431, Aerial Wire.[36] We stated that the LECs are rapidly phasing out the obsolete equipment recorded in these "dying accounts"[37] and replacing it with equipment based on newer technologies. We proposed to calculate the depreciation rates for these accounts from specific plant retirement schedules that the LECs have developed based on company plans to modernize their networks.[38] We stated that these rates would be more accurate and easier to calculate than rates based on national averages that require detailed statistical analyses of forecasted basic factors.[39]

14. In addition, we did not propose a range for Account 2121, Buildings.[40] We stated that, for depreciation study purposes, we had permitted the LECs great flexibility in subdividing this account and estimating lives for each subcategory. We also stated that, because of the significant differences among the categorization methods, the LECs' current basic factors for the subaccounts could not be used to establish nationwide ranges. In the FOIC, we proposed to maintain the basic factors underlying the currently prescribed depreciation rates for the buildings account, until our three-year range review when we will reconsider whether ranges would be appropriate for this account.[41] In the interim, we proposed to require that the price cap LECs submit the same data for the buildings account that would be required under our streamlined study procedures.[42]

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[36] 47 C.F.R. §§32.2211, 32.2115, 32.2431.

[37] "Dying accounts are asset accounts in which little or no new investment is being made, and for which substantial retirements are impending." Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, Report and Order, 3 FCC Rcd 984, 990 n.10 (1988).

[38] For example, both Bell Atlantic-Maryland, Inc. and Ameritech-Michigan have already retired all of their electro-mechanical switching equipment. For Maryland, the final retirement occurred in 1989 and for Michigan in 1993. In addition, Bell Atlantic-Maryland, Inc. and Ameritech-Michigan plan to retire all of their analog electronic switching equipment by 1998 and 1999, respectively. See Bell Atlantic-Maryland, Inc. 1995 Depreciation Rate Study (November 11, 1994); Ameritech-Michigan 1995 Depreciation Rate Study (December 2, 1994).

[39] FOIC, 9 FCC Rcd at 7654.

[40] 47 C.F.R. §32.2121.

[41] See Depreciation Simplification Order, 8 FCC Rcd at 8058.

[42] Depreciation Rates Branch, The Federal Communications Commission, The Federal Communications Commission Depreciation Study Guide §I (1995) describes these streamlined study procedures.

1. Position of the Parties

15. The parties commenting on these matters support our proposals.[43] MCI, Southwestern, and USTA indicate that there is no need to establish ranges for "dying accounts."[44] NARUC agrees that our proposed method for determining the rates for the three "dying accounts" would be more accurate than rates based on national averages. NARUC maintains that these rates can be readily calculated using individual company retirement schedules without the need for statistical analyses to forecast lives.[45] The commenters also concur with our proposed treatment of the buildings account.[46]

2. Discussion

16. We conclude that the public interest would be best served by adopting the alternate streamlined procedures for these accounts proposed in the FOIC. We find that the cost of establishing and administering ranges for these accounts would outweigh the benefits. As we stated in the FOIC, depreciation rates on obsolete equipment recorded in "dying accounts" can be readily calculated from retirement schedules using a methodology less complicated than the range approach. Moreover, to establish ranges for the buildings account would require that the LECs' present data be recast into new, uniform subcategories. The LECs have indicated that the cost of compiling the information necessary to develop new subcategories would be substantial.[47]

17. Furthermore, we find that the depreciation rates calculated for these accounts using our alternate streamlined procedures will be more accurate than depreciation rates based on the range approach. For the "dying accounts," the rates will reflect company-specific retirement schedules rather than national averages of the underlying basic factors. For the buildings account, we believe the present rates will reflect company operations over the next few years. The LECs do not have plans to add or retire a significant number of buildings during that period. As a result, the underlying depreciation factors applicable to Account 2121 likely will not change, and an extensive analysis of the buildings account probably will not be necessary within the next few years. In the interim, we believe that the data required under the streamlined study procedures will be adequate, and we will allow price cap LECs to submit only these data for the buildings account.

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[43] MCI Comments at 2; NARUC Comments at 5; Sprint Comments at 1; Southwestern Comments at 7; USTA Comments at 2.

[44] MCI Comments at 2; Southwestern Comments at 7; USTA Comments at 2.

[45] NARUC Comments at 5.

[46] MCI Comments at 2; NARUC Comments at 5; Southwestern Comments at 7; USTA Comments at 2.

[47] See Letter from Thomas R. Whittaker, Chairman, United States Telephone Association Ad Hoc Depreciation Committee, to Ms. Fatina Franklin, Chief, Depreciation Rates Branch (June 21, 1994).

C. Carriers Scheduled for Review in 1996 and 1997.

18. Under our depreciation prescription process, one-third of the carriers for which we prescribe depreciation rates have their rates reviewed each year. LECs scheduled for review in 1996 and 1997 may file for changes in their depreciation rates in 1995 as long as they use basic factors within the ranges we have selected and the ranges chosen are consistent with their operations. These carriers must file these depreciation rate changes by July 1, 1995.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 201-205 and 220(b), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 201-205 and 220(b), that the ranges for the future net salvage and the projection life factors for the accounts listed in Appendix B are HEREBY ADOPTED as specified in Appendix B.

20. IT IS FURTHER ORDERED, that this order is effective thirty days after publication in the Federal Register.

21. IT IS FURTHER ORDERED, that carriers may use the ranges established herein for federal filing purposes prior to the effective date of this order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Comments Filed

Ameritech Operating Companies (Ameritech)
Bell Atlantic (Bell Atlantic)
BellSouth Telecommunications, Inc. (BellSouth)
MCI Telecommunications Corporation (MCI)
Missouri Public Service Commission (Missouri Commission)
National Association of Regulatory Utility Commissioners (NARUC)
Pacific Bell and Nevada Bell (Pacific)
Southwestern Bell Telephone Company (Southwestern)
United and Central Telephone Companies (United)
United States Telephone Association (USTA)
U S WEST Communications, Inc. (U S WEST)

Reply Comments Filed

Bell Atlantic (Bell Atlantic)
General Services Administration (GSA)
Idaho Public Utilities Commission (Idaho Commission)
MCI Telecommunications Corporation (MCI)
National Association of Regulatory Utility Commissioners (NARUC)
Southwestern Bell Telephone Company (Southwestern)
United States Telephone Association (USTA)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95- 188

In re Application of	)	
	)	
FOX TELEVISION STATIONS, INC.	)	File No. BRCT-940201KZ
	)	
	)	
For Renewal of License of Station WNYW-TV, New York, New York	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1995 Released: May 4, 1995

By the Commission: Commissioner Quello concurring and issuing a statement

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IX. ORDERING CLAUSES 184

1. Fox Television Stations, Inc. ("FTS") seeks renewal of its license for station WNYW-TV (Channel 5) in New York City. The Metropolitan Council of NAACP Branches ("Metro NAACP") has petitioned to deny the renewal.[1] Also before us are numerous supplemental pleadings concerning the renewal application.[2]

I. INTRODUCTION

2. On May 23, 1994, FTS informed the Mass Media Bureau that The News Corporation Ltd. ("News Corp."), an Australian company, owns more than 99 percent of the corporate equity capital of FTS's parent company, Twentieth Holdings Corporation ("THC"), even though News Corp. owns only 24 percent of THC's voting stock. To determine whether the renewal application may be granted, we must therefore assess that ownership structure in light of Section 310(b)(4) of the Communications Act, which provides in pertinent part that:

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[1] The Petition to Deny and Reply to the Opposition to the Petition to Deny were filed in Metro NAACP's name only. Subsequent pleadings were filed on behalf of Metro NAACP and Hilda Rogers, Amnews, Inc., Wilbert A. Tatum, the New Jersey State Conference of Branches of the NAACP, Keith Jones, the Pennsylvania State Conference of Branches of the NAACP, Thomas Smith and Lynn Johnson, even though these individuals and organizations were not parties to the original Petition to Deny and have never formally sought to intervene. However, the Petition to Deny the WNYW renewal incorporates by reference an earlier Petition to Deny to which those individuals and organizations were parties. See Petition to Deny at 1.

[2] Before us are the following pleadings: (1) Petition to Deny FTS's renewal application, filed April 12, 1994 by Metro NAACP, and a Supplement thereto filed July 7, 1994; an Opposition to the Petition to Deny, filed May 12, 1994, by FTS, and a Reply, filed June 1, 1994, by Metro NAACP; (2) Metro NAACP's Further Supplement to Petition to Deny: Fox' [*sic*] Misconduct in Connection with the Gingrich Book Deal, filed January 27, 1995; FTS's Motion to Strike, filed February 6, 1995; Metro NAACP's Opposition to the Motion to Strike, filed February 22, 1995; and FTS's Reply to the Opposition to the Motion to Strike, filed March 1, 1995; (3) Comments of Metro NAACP and Comments of FTS, both filed February 27, 1995; Reply Comments of Metro NAACP and Reply Comments of FTS, both filed March 9, 1995; and (4) Rainbow Broadcasting, Inc.'s, Further Objection and Petition for Relief, filed March 9, 1995. Metro NAACP has also submitted a letter, dated March 22, 1995, purporting to "respond to several misstatements of fact" and "new matters" in FTS's Reply Comments. We have accepted and will consider the letter in the interest of fully airing the issues raised in this complicated proceeding.

> No broadcast . . . license shall be granted to or held by . . . any corporation directly or indirectly controlled by any other corporation of which . . . more than one-fourth of the capital stock is owned of record or voted by . . . any corporation organized under the laws of a foreign country . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. §310(b)(4). We must also decide whether the application should be designated for hearing based on other issues raised by Metro NAACP.

3. More specifically, this case presents the following issues: (1) whether News Corp.'s ownership of 99 percent of the capital contributed to THC exceeds Section 310(b)(4)'s benchmark of 25 percent of the "capital stock" of the company; (2) whether, if News Corp.'s interest is deemed to exceed the benchmark, FTS has intentionally concealed that fact or misrepresented its compliance with the statute in applications and other filings submitted to the Commission beginning in 1985; (3) whether News Corp. exercises *de facto* control over FTS or whether K. Rupert Murdoch, the Chairman of News Corp., controls FTS as the representative of News Corp.; and (4) if we find that FTS's alien ownership exceeds the benchmark, that FTS is under alien control, or that FTS has lacked candor, what remedial action, if any, is appropriate.

4. FTS takes the position that its corporate structure complies with Section 310(b)(4) because the 25 percent "capital stock" benchmark refers only to a parent corporation's shares of stock – of which News Corp. owns 24 percent – and not to an alien's equity stake. FTS also submits that at all times since 1985 it has fully disclosed to the Commission that News Corp. would have the entire "beneficial equity interest" in FTS and thus cannot be found to have lacked candor or misrepresented its compliance with the statute. FTS further contends that Murdoch, a United States citizen, holds both *de facto* and *de jure* control of FTS and that he holds *de facto* control of News Corp. as well. Finally, FTS asserts that, even if we were to find that its alien ownership exceeds the benchmark, that ownership is consistent with the public interest.

II. SUMMARY

5. This case presents complex factual and legal issues. In order to develop a clearer and more complete record upon which to evaluate the central factual issues raised in the Petition to Deny, the staff conducted an informal investigation into FTS's alleged lack of candor. As a result, the underlying facts and the positions of the parties have been clarified. The Commission now has a sufficient basis upon which to determine the proper course of action. For the reasons set forth below, we deny Metro NAACP's Petition to Deny, and grant FTS's renewal application conditioned upon FTS's election

either (1) to submit information demonstrating that the level of FTS's foreign ownership is consistent with the public interest; or (2) to come into compliance with the foreign ownership benchmark of Section 310(b)(4).

6. We find that News Corp.'s ownership of THC's "capital stock" exceeds the 25 percent foreign ownership benchmark established in Section 310(b)(4). THC wholly owns the licensee, FTS. Although News Corp. owns only 24 percent of the total number of outstanding shares of THC stock, News Corp. contributed over 99 percent of the capital invested in THC and is entitled to virtually all of the economic incidents of THC's operation. In these circumstances, we conclude that the statute requires us to evaluate not only the number of shares of stock held by alien owners, but also the amount of equity capital contributed by such owners. Such an approach effectuates the statutory objective, and will enable the Commission to perform a *bona fide* analysis of alien ownership. This decision is also consistent with the Commission's prior decisions, including the staff's unreported 1985 decision in American Colonial, and later Commission decisions, including Wilner & Scheiner and Univision.[3]

7. Even though FTS exceeds the ownership benchmark, we do not conclude that FTS intentionally misrepresented or concealed that fact. Although there are some disputed issues as to subsidiary or "proximate" facts, the totality of the evidence before us does not present a substantial and material question of fact on the ultimate issue of whether FTS misrepresented the facts or lacked candor in its 1985 transfer application or any of its subsequent filings with this Commission. We reach this decision after careful review of the voluminous documentary and testimonial evidence and the parties' lengthy submissions.

8. We recognize that our reported interpretations of Section 310(b)(4) at the time FTS filed its original application in 1985 did not clearly indicate that a foreign corporation's equity capital contributions were of decisional significance to the Commission in determining a *corporate* parent's compliance with the statutory benchmark. Thus, although the Commission had held that capital contributions were relevant in the limited partnership context, the totality of the circumstances leads us to conclude that FTS did not believe that it had a duty to disclose the amount of equity capital contributed to THC by foreign interests, and thus FTS did not intentionally conceal this information in an effort to deceive the Commission.

9. We further find that Murdoch, by virtue of his controlling voting interest in THC, exercises *de jure* control over that company and its wholly-owned subsidiary,

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[3] For a discussion of Commission precedent interpreting Section 310(b)(4), see ¶¶64-68, *infra*.

FTS. Moreover, the record shows that Murdoch was in charge of THC's day-to-day operations and dominated its corporate affairs. While FTS and THC are subsidiaries of News Corp. for financial reporting purposes, the totality of the evidence demonstrates that Murdoch, a United States citizen, nonetheless exercises *de facto* control over THC. We reject the contention that as a consequence of his position with News Corp., Murdoch is acting as a representative of alien interests.

10. As stated in ¶ 6, in this decision the Commission holds that News Corp.'s 99 percent capital contribution to THC exceeds the 25 percent benchmark. A licensee is permitted to exceed the benchmark, however, where the Commission expressly finds that the "public interest" would be served. Absent such a public interest finding, FTS must comply with the benchmark.

11. We have insufficient information on the record at this time to make a public interest determination in this case. Therefore, not later than 45 days from the release of this order, FTS may either proffer a showing of why non-compliance with the Section 310(b)(4) benchmark is in the public interest, or file a statement demonstrating how and by what date it will comply with the benchmark. Other persons may comment on FTS's submission 30 days thereafter. FTS may then reply to said comments in not more than 15 days. The Commission intends to rule promptly thereafter.

III. BACKGROUND

12. In May 1985, THC agreed to purchase six television stations from Metromedia, Inc. and affiliated companies.[4] THC later assigned its contract with Metromedia to FTS, a newly-created and wholly-owned subsidiary of THC, which on June 24, 1985, filed a series of applications (collectively, the "Application") for Commission approval of the assignment of licenses.[5]

13. The Application certified FTS's compliance with Section 310, supporting that certification with an exhibit describing the would-be licensee's proposed ownership

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[4] The six stations were WNYW-TV (formerly WNEW-TV) in New York City, New York; KTTV-TV in Los Angeles, California; WFLD-TV in Chicago, Illinois; WTTG-TV in Washington, D.C.; KDAF-TV (formerly KRLD-TV) in Dallas, Texas; and KRIV-TV in Houston, Texas.

[5] The Application was actually filed by FTS's corporate predecessor, News America Television, Inc. Because the names of many of the entities involved in this matter have changed over time, we will indicate the original entity name and its current name, but thereafter will refer only to the current name.

structure. MMB Ex.[6] 14 at 14-16. The exhibit declared that FTS, the licensee, would be wholly owned by THC, a domestic corporation, which in turn would be owned as follows:

> THC will issue two classes of stock, one common and one preferred. The preferred stock will exercise 76% of the vote on all matters; and the remaining 24% of the vote will be exercised by the common stock. The holders of the preferred shares will be entitled to a fixed return on capital investment. All other profits and losses of the Corporation will be attributable to the common shares.

MMB Ex. 14 at 14.[7]

14. Murdoch, then an Australian national seeking U.S. citizenship,[8] was to own all of the preferred stock of THC, and Fox, Inc. all of the common stock.[9] Fox, Inc., a domestic corporation, was wholly owned through various intermediary companies by News Corp., an Australian company. MMB Ex. 14 at 14-15. FTS asserted that Murdoch held *de facto* control of News Corp. by virtue of his position as its Chairman and a Director and his purported right to vote a controlling interest in two private investment companies that together were represented to hold 46 percent of News Corp.'s voting stock.[10]

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[6] "MMB Ex." will be used herein to refer to the exhibits compiled by the Bureau for use in its informal investigation into FTS's alleged lack of candor. All of the documents produced and sworn testimony gathered in the course of the investigation have been made part of the public record in this proceeding. Documents that are not exhibits are referred to by the production numbers assigned to them by counsel for FTS.

[7] In an October 2, 1985 amendment to the Application, FTS stated more particularly that 7,600 shares of preferred stock and 2,400 shares of common stock would be issued. MMB Ex. 18 at 5.

[8] Murdoch officially became a United States citizen on September 4, 1985, at which time FTS filed an amendment to its Application reflecting that fact.

[9] Fox, Inc. is the successor to News Group Publications, Inc.

[10] According to the Application, the companies were owned jointly by members of Murdoch's family and by various trusts established for the benefit of Murdoch and his family. MMB Ex. 14 at 15.

15. As required by FCC Form 314, the Application described the foreign sources of funds necessary to finance the transaction and for initial operating costs:

> To complete the proposed transaction, the assignee will be required to have available approximately $600 million above the assumption of existing debt. These funds will be provided through open credit lines in favor of [News Corp.] and its subsidiaries now available with American, European, and Australian banks. Any funds obtained from other than U.S. financial institutions will be borrowed by certain foreign subsidiaries of [News Corp.] and contributed as capital to the assignee. Funds obtained through borrowings from U.S. financial institutions will be made by [Fox, Inc.], a U.S. subsidiary of [News Corp.], and contributed as capital or loaned to the assignee.

MMB Ex. 14 at 37-38. The Application did not otherwise disclose whether the capital would be contributed to FTS in the form of debt, equity, or some combination.

16. The Commission granted the Application and approved assignment of the six Metromedia station licenses despite several petitions to deny, none of which squarely addressed the issue of News Corp.'s capital contributions to or ownership of THC under Section 310(b) that we face today.[11] The transfer was consummated on March 6, 1986, and one month later, FTS filed the requisite ownership report, see 47 C.F.R. § 73.315. The Ownership Report indicated that a total of $760,000 had been paid for the THC preferred shares, but it did not reveal a specific amount that had been paid for the common shares. MMB Ex. 13 at 15. Instead, in the space on the form in which that information would have been provided, FTS referred to an attached exhibit. The attached exhibit referred generally to the Asset Purchase Agreement between FTS and Metromedia. That agreement did not, however, disclose the amount of equity capital that would be paid by News Corp. for its shares of THC stock. See MMB Ex. 13 at 18. Since 1986, FTS has filed three applications for new stations and twelve renewal applications, certifying in each one that it is in compliance with Section 310.[12]

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[11] Metromedia Radio & Television, Inc., 102 F.C.C.2d 1334, 1337-40 (1985), recon. denied, 59 R.R.2d 1211 (1986), aff'd sub nom. Health & Medicine Policy Research Group v. FCC, 807 F.2d 1038 (D.C. Cir. 1986).

[12] FTS filed applications to acquire KSTU-TV in Salt Lake City, Utah, on November 11, 1989; WATL-TV in Atlanta, Georgia, on February 5, 1993; and WFXT-TV in Boston, Massachusetts, on October 13, 1994. It has filed the following renewal applications: WTTG-TV (May 30, 1986); WFLD-TV (July 31, 1987); KTTV-TV

17. The issues concerning FTS's foreign ownership and control that are now before us first arose in 1993, when Metro NAACP supplemented its petition to deny the application of an FTS subsidiary to acquire the license for WGBS-TV (Channel 57) in Philadelphia on the ground that News Corp. held *de facto* control of FTS. Combined Broadcasting, Inc., File No. BTCT-9310818KE (Supp. Petition filed Nov. 19, 1993). Metro NAACP based its allegation partly on News Corp.'s 1993 annual report to shareholders describing its interests in THC as "representing substantially all of the equity" of that company; Metro NAACP asserted that News Corp.'s equity contribution necessarily led to control. Metro NAACP also claimed that certain features of THC's preferred shares, such as mandatory redemption at par value, made those shares debt and not equity, thus undercutting Murdoch's claim of *de jure* control of FTS. In any event, Metro NAACP claimed, Murdoch himself was the representative of aliens by virtue of his corporate positions at News Corp.

18. In response, FTS asserted that it had fully disclosed the ownership and funding structure of THC in 1985, and that the Commission had reviewed and approved that structure; that Murdoch's THC stock conveyed corporate voting rights and therefore could not be considered to be debt; and that he voted his THC stock independently, and not as a representative of News Corp. These issues ultimately were not resolved in the Philadelphia proceeding, however, because FTS voluntarily dismissed its application before the Commission could act on it, thereby mooting the matter.[13]

19. Although the Philadelphia proceeding became moot, FTS expressly "request[ed] that the Commission address the issues raised by Petitioners which [*sic*]

(March 31, 1988); KDAF-TV (March 31, 1988); KRIV-TV (March 31, 1988); WNYW-TV (February 1, 1989); WTTG-TV (May 30, 1991); WFLD-TV (July 29, 1992); KDAF-TV (March 31, 1993); KRIV-TV (March 31, 1993); KSTU-TV (June 1, 1993); and this renewal application for WNYW-TV (February 1, 1994). In addition, a wholly-owned subsidiary of FTS filed an application to acquire WGBS-TV in Philadelphia, Pennsylvania, on August 18, 1993, but subsequently requested, and was granted, dismissal of the application. See ¶¶17-18, *infra*.

[13] Letter from William S. Reyner to Roy Stewart (Feb. 23, 1994). While the Philadelphia proceeding was still pending, the same foreign ownership issues were raised in proceedings on renewal of FTS's license for KTTV-TV, Los Angeles. We declined to reach the ownership issues in that case, however, because they were raised quite late in the proceedings and because they were to be considered in the course of the then-pending Philadelphia proceeding. Instead, we conditioned the grant of FTS's renewal upon the outcome of the alien ownership question. Fox Television Stations, Inc., 9 FCC Rcd 62 (1993), aff'd sub nom. Rainbow Broadcasting, Inc. v. FCC, No. 94-1060 (D.C. Cir. Mar. 21, 1995).

respect to the FTS ownership structure," Letter of February 23, 1994 from William S. Reyner to William Caton, and we continued to address Metro NAACP's allegations both on that request and on our own initiative.[14] Accordingly, on March 4, 1994, the Mass Media Bureau sent FTS a Letter of Inquiry seeking to establish "more precisely the equity ownership structure of FTS." MMB Ex. 6 at 1. Specifically, the Bureau sought: (1) a detailed description of all equity ownership (including the percentage of such ownership) in FTS held by aliens, including News Corp.; (2) an explanation of whether alien equity ownership differs among licensees in which News Corp. has an indirect ownership interest; and (3) a description whether and how Murdoch "is authorized to exercise voting control of [News Corp.]." Id.

20. FTS's March 21, 1994, reply stated that Murdoch, a United States citizen, owned all of THC's preferred stock, "constituting 76 percent of both the voting power and the capital stock of the company," and that Fox, Inc. owned all of THC's common stock, "constituting 24 percent of both the voting power and the capital stock of the company." MMB Ex. 7 at 1-2. The letter further stated that with the exception of the $760,000 paid for the preferred shares, "all funding to THC and FTS was supplied as intra-company loans or capital advances from News Corp. entities." Id. at 2. FTS did not expressly indicate what portion of that funding was provided in the form of equity and what portion in the form of debt. It stated, however, that "the amount of News Corp.'s equity funding contribution has always been in excess of 25 percent of THC's aggregate equity funding." Id. at 10. In response to the Bureau's question asking FTS to state the percentage of alien ownership, FTS answered that because there was no foreign influence over FTS, "the precise dollar value of News Corp.'s equity contribution at any given time would appear immaterial to the Commission's Section 310(b) analysis." Id. at 2. FTS also provided certain information about the various trusts through which Murdoch claimed to control much of the vote of News Corp.

21. On May 11, 1994, the Bureau issued a second Letter of Inquiry in which it requested "specific answers" to its earlier inquiries. MMB Ex. 8 at 1. The second Letter of Inquiry explained that FTS's reply to the first letter was incomplete because (1) it failed to specify the percentage equity ownership News Corp. and other aliens hold in FTS, and (2) it did not clearly explain how Murdoch exercised *de facto* control over News Corp.

22. FTS's May 23, 1994, response to the second Letter of Inquiry stated that News Corp. has "approximately a 99 percent economic/equity interest" in THC. MMB

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[14] See Booth American Co., 58 F.C.C.2d 553, 554 (1976) (withdrawal of petition to deny does not dispose of the issues raised by the petition; rather, the Commission must consider the merits of the petition).

Ex. 9 at 2. Even though FTS apparently recognized that it had never explicitly stated that percentage of equity, FTS asserted "it has always been recognized, even absent a specific percentage, that the common stock of THC represents virtually all of the corporation's aggregate economic/equity interest." Id. FTS also explained that it believed that even if the level of alien ownership were deemed to exceed 25 percent, its ownership structure had been approved by the Commission. Id. at 4-8. It relied on the Commission's general conclusion in 1985 that transfer of the licenses would serve the public interest, Metromedia, 102 F.C.C.2d at 1352, and on its own assertion that Murdoch held *de facto* control of News Corp. Finally, FTS explained additional information about the trust arrangements that allegedly gave Murdoch *de facto* control of News Corp. MMB Ex. 9 at 8-11.

23. In the meantime, on February 1, 1994, FTS had applied to renew its license for WNYW-TV, and Metro NAACP petitioned to deny the application. In a supplemental pleading, Metro NAACP reiterated the control issues that had been raised in the Philadelphia proceeding and added the charges that FTS lacked candor with respect to its alien ownership and misrepresented its compliance with Section 310.

24. After reviewing all of the above material, the Bureau concluded that the existing record on FTS's alleged lack of candor was insufficient to determine whether there was a substantial and material issue of fact that needed to be resolved at a hearing. One of the primary factual issues on which the record was insufficient arose from FTS's assertion that the Commission had in 1985 been made aware of the extent of News Corp.'s capital investment in THC, and had nonetheless determined and held *sub silentio* that alien ownership nearly far exceeding the 25 percent statutory benchmark level in FTS's parent company was in the public interest.[15] Accordingly, the Bureau decided to conduct an informal investigation to supplement the record with additional factual information upon which to base a recommendation on the candor issue.[16] The Bureau asked FTS to produce various documents related to the Application and FTS's understanding of Section 310; and propounded additional questions regarding the persons

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[15] In the comments and reply comments filed after the Bureau's investigation, FTS no longer presses the assertion that the Commission in 1985 made a public interest finding regarding ownership in excess of the benchmark. See ¶75, *infra*.

[16] See Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621 (D.C. Cir. 1978) (*en banc*) (approving use of informal investigations to determine whether to designate a matter for hearing). In Fox Television Stations, Inc., FCC 95-40 (Feb. 6, 1995), we rejected Metro NAACP's request to terminate the Bureau's investigation. We also rejected Rainbow's request to intervene as a party to the investigation, but allowed it to file informal comments. Rainbow has appealed that decision. Rainbow Broadcasting, Inc. v. FCC, No. 95-1156 (D.C. Cir. filed March 8, 1995).

involved in the preparation of FTS's various applications, ownership reports, and responses to the letters of inquiry.[17] Subsequently, another document request and additional questions were served on FTS.[18] Eventually, FTS produced a number of documents that had been requested by the Bureau but initially withheld from production, while reserving the right to assert the attorney-client privilege with respect to those documents in the future.[19]

25. Bureau personnel took sworn testimony from 17 witnesses who presently or formerly worked for FTS and related companies, or who had performed legal services for FTS in connection with the Metromedia deal.[20] Bureau personnel also interviewed

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[17] Letter from Renée Licht to William S. Reyner, Jr. (Dec. 7, 1994).

[18] Letter from Renée Licht to William S. Reyner, Jr. (Jan. 4, 1995).

[19] See Letter from Renée Licht to William S. Reyner, Laura Blackburne, and David Honig (Jan. 13, 1995). FTS generally produced documents relevant to its filings with this Commission, as well as filings with other governmental agencies that reflected upon FTS's ownership structure; notes of meetings with Commission staff; and correspondence and memoranda discussing FTS's compliance with foreign ownership restrictions. FTS originally withheld from production approximately 300 documents based upon various claims of privilege. After the Bureau specifically identified 93 of those documents as to which the claimed privileges seemed particularly unfounded, FTS produced 52 additional documents, which FTS deemed not to be privileged after further review. FTS's agreement to produce additional documents while reserving the right to assert the attorney-client privilege in the future led to the production of 31 additional documents. FTS did not, however, waive its assertions of the work product doctrine, and accordingly continued to withhold over 200 documents.

[20] The following witnesses testified: Murdoch; Barry Diller, formerly President of Fox, Inc.; Chase Carey, current President of FTS; Molly Pauker, current Vice President for Corporate and Legal Affairs for FTS; Richard Sarazen, a former director of FTS; David DeVoe, a director of FTS; Brian Madden, Joel Levy, Howard Squadron, Arthur Siskind, Michael Gardner, James Denvir, and Elizabeth Hayes, all of whom served as outside counsel to FTS; Thomas R. Herwitz, formerly Vice President of Corporate and Legal Affairs for FTS; David Handelman, formerly Vice President and Secretary of THC and General Counsel of Fox, Inc.; Daniel Brennan, formerly Vice President for Taxation of News America Publishing, Inc.; and Larry Kessler, formerly General Counsel of News America Publishing. Metro NAACP asked that six additional persons be deposed, but the Bureau declined because it determined that those witnesses were not likely to provide information within the scope of the investigation. Bureau personnel questioned the witnesses and both FTS and Metro NAACP had the opportunity to suggest additional

and obtained written statements from 12 present and former Commission employees with knowledge of the original FTS application proceeding.[21]

26. The Commission waived 47 C.F.R. § 19.735-206 and FCC INST 1113.4[22] to permit current and former FCC employees to be interviewed concerning the Commission's 1985 decision to approve transfer of the licenses to FTS, and authorized release of all Commission documents related to the 1985 proceeding on the Application. Fox Television Stations, Inc., 10 FCC Rcd 2246 (1995). After that waiver, FTS obtained additional statements from Allen Glasser, Jerald Fritz, and Alan Aronowitz. Prior to the waiver, FTS had already obtained statements from James McKinney and Diane Killory, formerly legal adviser to Commissioner Dennis Patrick. All statements obtained by FTS were provided to the Bureau and Metro NAACP.

27. At the conclusion of the investigation, the parties submitted extensive comments and reply comments.[23] Metro NAACP reiterates its claims that FTS's alien

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questions for the staff to ask. In addition, by agreement, both FTS and Metro NAACP were permitted directly to ask three questions of each witness.

[21] The Commission employees who supplied statements were: Stephen Sewell, Assistant Division Chief of the Mass Media Bureau's Video Services Division in 1985; Allen Glasser, the Mass Media Bureau attorney responsible for drafting the 1985 Metromedia decision; Roy Stewart, currently Chief of the Mass Media Bureau and Chief of the Video Services Division in 1985; Clay Pendarvis, Chief of the Mass Media Bureau's Television Branch in 1985 and at present; Thomas Herwitz, a legal adviser to former Chairman Mark Fowler in 1985; James McKinney, Chief of the Mass Media Bureau in 1985; Robert Pettit, legal advisor to Commissioner Mimi Dawson in 1985; Jerald Fritz, Chief of Staff to Chairman Fowler in 1985; Alan Aronowitz, a Mass Media Bureau attorney who worked in the Video Services Division in 1985; K. Gordon Oppenheimer, a Mass Media Bureau attorney in 1985; and Jack Smith, General Counsel to the Commission in 1985. The Bureau provided copies of these statements to FTS and Metro NAACP. The Bureau also requested voluntary statements from the four commissioners who participated in the 1985 Metromedia decision, and received such a statement from former Commissioner Mimi Dawson. The other commissioners declined to submit statements for the record.

[22] The cited rules generally prohibit disclosure by Commission employees of any information, or any portion of the contents of any document, that is part of the Commission's records and that is not routinely available to the public.

[23] On March 9, 1995, Rainbow Broadcasting filed a "Further Objection and Petition for Relief." All of Rainbow's arguments have been raised by Metro NAACP, and so are

ownership greatly exceeds the 25 percent benchmark of Section 310(b)(4) and that FTS has engaged in a decade-long campaign of deception about its alien ownership, beginning with its assignment application in 1985 and continuing through the ownership report, the renewal applications, and even the Bureau's Letters of Inquiry. That behavior, Metro NAACP claims, presents a lack of candor so severe that FTS should be barred from holding any of its licenses. In addition, Metro NAACP again argues that FTS's ownership violates Section 310(b) because News Corp., not Murdoch, controls THC, and that even if Murdoch controls both News Corp. and THC, he does so as a representative of aliens. Although Metro NAACP originally requested that the application be designated for hearing pursuant to Section 309(e) of the Communications Act, it now urges that the license should be denied outright, without a hearing.

28. FTS maintains that there has been at all times full, consistent and candid disclosure of the nature and extent of foreign ownership. It claims that the exhibits to the Application combined with information in the 1986 Ownership Report made clear that Murdoch holds 76 percent of the voting stock of THC, while News Corp. holds 24 percent of the voting stock as well as substantially all of the equity interest in THC. It argues that its structure complies with Section 310(b)(4) because the statute regulates shares of stock and not capital contributions. FTS urges that even if its capital structure is deemed to exceed the 25 percent ownership benchmark, it must be considered to be in compliance with the statute until the Commission finds that the public interest would be disserved by permitting such ownership, a finding that FTS argues cannot be made. We now address these issues.

IV. PROCEDURAL STANDARDS

29. We assess each of Metro NAACP's allegations under the standard set forth in Astroline Communications Co. v. FCC, 857 F.2d 1556 (D.C. Cir. 1988), to determine whether the circumstances warrant a hearing. First, with respect to each issue we must determine whether, assuming all facts alleged by Metro NAACP to be true, it has set forth a *prima facie* case that the renewal of FTS's license would be inconsistent with the public interest, convenience, and necessity. If we find that showing has been made, we must then determine whether the evidence before us presents a "substantial and material question of fact" that precludes us from determining whether renewal of the license would serve the public interest, convenience, and necessity without a hearing. In making that determination, we "may, and indeed must, weigh against the allegations of the petition to deny the other evidence" before us, Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 395 (D.C. Cir. 1985), and determine whether "there is a substantial question of fact such that the totality of the evidence arouses a sufficient doubt on the

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addressed in full herein.

point requiring further inquiry." Metropolitan Council of Metro NAACP Branches v. FCC, 46 F.3d 1154, 1159 (D.C. Cir. 1995)(citing Citizens for Jazz, 775 F.2d at 395). In making that determination, "the balancing of disputed proximate facts is a matter for [our] judgment." Id.

30. We make those determinations in this case based on a substantial evidentiary record. As described more fully below, in addition to the facts presented in Metro NAACP's petitions to deny and FTS's responses,[24] we have before us FTS's responses to two Letters of Inquiry from the Mass Media Bureau, in each of which FTS responded to several questions about FTS's ownership. We also have considerable evidence gathered in the course of an investigation conducted by the Bureau to supplement the factual record on FTS's candor with respect to its foreign ownership.[25] That material includes FTS's responses to additional written questions; hundreds of documents, including assertedly privileged documents, produced by FTS pursuant to the Bureau's document requests; the testimony of 17 present and former FTS employees and attorneys who were involved in the events now at issue; and the sworn declarations of 12 present and former Commission personnel. Finally, FTS and Metro NAACP have each submitted lengthy comments and reply comments on the evidence and issues.

V. ALIEN OWNERSHIP OF FTS EXCEEDS THE BENCHMARK ESTABLISHED IN SECTION 310(b)(4)

31. Metro NAACP's contention that FTS lacked candor or affirmatively misrepresented facts is based on the fundamental assumption that FTS is not in compliance with the 25 percent statutory ownership benchmark established in Section 310(b)(4) of the Communications Act because News Corp. provided over 99 percent of the capital invested in FTS's corporate parent. FTS, however, asserts that it is now, and at all relevant times has been, in compliance with the benchmark because News Corp. holds only 24 percent of the shares of stock of THC. The material facts related to FTS's alleged non-compliance with the Section 310(b)(4) benchmark are undisputed, and therefore a hearing on this issue is not necessary. Washington Ass'n for Television & Children v. FCC, 665 F.2d 1264, 1270 (D.C. Cir. 1981).

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[24] Two Petitions to Deny are relevant: first, the Petition to Deny the WNYW license, and second, an earlier petition filed by Metro NAACP to deny an application by a wholly-owned subsidiary of FTS to acquire station WGBS in Philadelphia. We take official notice of the allegations contained in the WGBS petition in this proceeding.

[25] See Interim Procedural Order, File No. BRCT-940201KZ (MMB Dec. 7, 1994), modified, Second Interim Procedural Order, File No. BRCT-940201KZ (MMB Dec. 21, 1994).

32. As discussed in more detail below, we conclude that THC's foreign ownership exceeds the statutory ownership benchmark because approximately 99 percent of the company's equity capitalization was provided by a foreign corporation. In so concluding, we recognize that the Commission's prior decisions have directly addressed the relevance of capital contributions in determining compliance with the ownership limitations in the context of limited partnerships, and although the rationale of those decisions may also apply in the corporate context, no Commission decision has clearly explained how the ownership benchmark should be computed for corporations or the extent to which capital contributions may be material to that computation. Accordingly, in this decision, we set forth the legal basis for our conclusion that the amount of alien capital contributed to a corporation is a relevant consideration in deciding whether the ownership benchmark is exceeded and, in particular, why it is relevant to THC's corporate structure.

A. The Ownership Benchmark Applies to Beneficial Ownership Interests

33. The statutory benchmark at issue in this case applies to a "corporation . . . of which more than one-fourth of the capital stock is owned of record or voted by . . . a corporation organized under the laws of a foreign country." 47 U.S.C. § 310(b)(4). The issue here is whether News Corp., an Australian corporation, has an interest in THC's "capital stock owned of record or voted" that exceeds the benchmark.

34. FTS argues that the ownership benchmark percentage can only be computed by counting the number of shares of stock (regardless of class, voting rights, or relative value) that is owned of record by an alien individual or corporation, and then comparing that number to the total number of outstanding shares of stock issued by the corporation. In support of its interpretation, FTS points to the phrase "capital stock owned of record" and argues that "for legal and accounting purposes, the term 'capital stock' traditionally describes and includes all of the securities that represent equitable ownership of the issuing corporation's capital funds." FTS Comments at iii. FTS also argues that nothing in the legislative history or judicial case law provides any basis for the view that Section 310(b)(4) imposes a limitation on the amount of foreign capital contributions or beneficial equity holdings in corporations subject to the statute.

35. We agree with FTS that, in some contexts, counting the number of shares of outstanding stock owned of record by aliens yields an accurate assessment of the extent of alien ownership interests in a corporation. Thus, in some circumstances, it is an appropriate method for determining compliance with the Section 310(b)(4) ownership benchmark. We do not agree, however, that in all circumstances the method FTS advocates for determining ownership interests comports with common sense or congressional intent.

36. As discussed in detail below, in enacting the statutory language in question, Congress clearly indicated its concern with the extent to which aliens possess substantial ownership interests in corporations, in addition to and independent of alien voting interests. Using a simple "count the shares" approach may not accurately reflect the actual extent of alien ownership interests in a corporation, particularly when the corporation issues more than one class of stock, and those classes have widely divergent characteristics. Accordingly, to carry out Congress's intention that the extent of alien ownership interests be fairly evaluated, the Commission must construe the benchmark in a manner that considers factors in addition to the number of alien-owned shares of stock where the distribution of shares of stock is not proportionate to equity interests. Thus, the Commission should consider the amount of foreign capital contributions to a corporation in determining compliance with the statutory ownership benchmark.

37. First, the language of the statute and its legislative history amply support the proposition that in enacting Section 310(b)[26] Congress was concerned with the extent of alien beneficial interests, both in licensees and parent companies that control licensees. By its express terms Section 310(b) provides limitations on the amount of capital stock which can be "owned . . . or voted" by aliens. Because the statutory limitations are cast in the disjunctive, we previously concluded in our 1985 Wilner & Scheiner decision[27] that ownership interests in limited partnerships -- as opposed to voting interests -- are considered independently when evaluating compliance with the benchmark. See 103 F.C.C.2d at 519 n.37. Thus, for example, in the Reconsideration Order, we concluded that non-voting preferred stock "owned" by alien interests must be counted toward evaluating the benchmark, even if that stock possesses "none of the indicia normally associated with equity ownership." See 1 FCC Rcd at 13-14.

38. The legislative history confirms that through Section 310(b), Congress intended to expand the existing laws governing alien ownership of communications facilities to include new restrictions on ownership interests in corporations. While Section 310(b) was enacted in 1934 as part of the original Communications Act, its provisions pertaining to radio originated in the Radio Act of 1927, Pub. L. No. 69-632, §12, 44 Stat. 1162, 1167 (1927). Section 12 of the Radio Act barred the grant or

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[26] The benchmark was originally codified as Section 310(a)(5) of the Communications Act of 1934. It was renumbered to (b)(4) in 1974. See Pub. L. No. 83-505, § 2, 88 Stat. 1576 (1974). For convenience, we will refer to Section 310(b)(4), the current codification.

[27] Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as Amended, 103 F.C.C.2d 511 (1985) ("Wilner & Scheiner"), reconsidered in part, 1 FCC Rcd 12 (1986) ("Reconsideration Order").

transfer of a license to any company, corporation, or association "of which . . . more than one-fifth of the capital stock may be voted by aliens." The Radio Act's provisions thus barred alien ownership only of (1) the licensee's capital stock that (2) had voting power.

39. The Communications Act added significant additional restrictions on alien ownership. First, in order to address a perceived loophole in the law,[28] Congress decided to apply specific alien ownership restrictions to parent companies that controlled licensees and, for that purpose, ultimately enacted Section 310(b)(4). Second, and most pertinent here, Congress added a new restriction to the existing Radio Act benchmark language applicable to licensees (currently Section 310(b)(3) of the Act) which would limit ownership regardless of voting power, and used virtually the same benchmark terminology in the new provision that governed parent corporations (now Section 310(b)(4)). Thus, the new act placed restrictions on capital stock in licensees and their parent companies that was "owned of record or voted by aliens."

40. The new limitations on alien ownership and provisions concerning parent companies were enacted in large part due to the efforts of Captain S.C. Hooper, Director of Naval Communications for the Department of the Navy, who vigorously argued that protection of the United States's security and national defense interests required greater restrictions on alien ownership of capital stock than those in the Radio Act. Thus, in his testimony and submissions in both the House and Senate Committee Hearings leading to the Act, the Director offered extensive evidence on issues relating to foreign ownership and influence, and specifically advocated that "no more than one-fifth of the capital stock of any United States communication company, including holding companies, should be owned by aliens or their representatives, and foreign-owned stock should not be entitled to voting privileges."[29] In the end, Congress did not enact the strict prohibition on alien ownership through holding companies that had been championed by the Navy. Nor did Congress impose a complete ban on alien ownership of corporate stock with voting power. Instead, Congress decided to permit such foreign-held interests in corporate parents of licensees up to a 25 percent benchmark level and reserved to the Commission the discretion to reject alien voting or ownership interests above the benchmark if the

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[28] See 1 Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 8301, A Bill to Provide for the Regulation of Interstate and Foreign Communication by Wire or Radio, and for Other Purposes, 73d Cong., 2d Sess. 44 (1934) ("House Hearings").

[29] E.g., House Hearings, at 23-24, 35, 51-53, 55.

Commission found that the public interest would be served by the refusal or revocation of such licenses.[30]

41. Commenting on this new benchmark standard, both the Senate Report and Conference Report make clear that the new ownership language, in contrast to the Radio Act's provision concerning voting power, was a specific, additional limitation that applies to stock ownership alone. See S. Rep. No. 781, 73d Cong., 2d Sess. 7 ("Senate Report"); H.R. Rep. No. 1918, 73d Cong., 2d Sess. 48 ("Conference Report"). The Conference Report, in contrasting the new benchmark standard of Section 310(b) with the restriction on voting stock in the Radio Act, stated that the "Senate bill changes [the Radio Act] by making the restriction apply also where one-fifth of the capital stock is owned of record by the designated persons and altering the words 'may be voted' to 'is voted.'" Conference Report at 48. Thus, the conferees explicitly recognized that the new act, in contrast to the Radio Act, "also" contained a new, independent restriction on ownership of capital stock. The Senate Report describes the benchmark as

> modif[ying] the present law by (1) refusing a station license to a company more than one-fifth of whose capital stock is owned of record by aliens, and (2) by changing the words "may be voted by aliens" in the present law to "is voted by aliens." The purpose of this is to guard against alien control and not the mere possibility of alien control.[31]

In Wilner & Scheiner, we discussed the Senate Report's language and concluded that the benchmark restriction on alien ownership was an independent restriction on ownership of capital stock, even where such ownership does not confer control. See 103 F.C.C.2d at 517 n.31. We also concluded in Wilner & Scheiner that the Senate Report's statement disclaiming an intent to address "the mere possibility of control" was not made in connection with the ownership benchmark, but relates instead to the modification in the voting benchmark. Id. We reaffirm that conclusion as well. The change in language from "may vote" to "is voted" is logically related to the Senate Report's distinction between alien control and "the mere possibility of control." The statement bears no logical relationship to the fact that the benchmarks were broadened to incorporate a new criterion based on ownership alone. We reaffirm that assessment. Against this background, it is apparent that Congress was fully aware of the implications of imposing restrictions on alien beneficial ownership of capital stock in communications companies -- and ultimately concluded that some additional restrictions were necessary. Therefore, in the absence of any express indication that Congress intended to constrain our authority, we conclude that Congress intended for us to construe the benchmark standard in a

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[30] Conference Report at 48-49; 78 Cong. Rec. 10978 (1934).

[31] Senate Report at 7.

manner that allows for a meaningful assessment of alien ownership interests in corporate licensees and parent companies. See Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 118 (1983) (in construing any statute, "our task is to interpret the words of the statute in light of the purpose Congress sought to serve").

42. FTS's insistence that we calculate the ownership benchmark only by counting the number of shares of stock issued to aliens, regardless of the class or nature of such stock, could, in some instances, yield results that bear no relationship to an alien's actual ownership interest in a corporate holding company or licensee. For example, a corporate applicant's parent company could issue four shares of stock, all of which vote, but three of which are purchased by United States citizens for $1 each, while an alien pays $1 billion for the remaining share. Under FTS's interpretation, this arrangement would comply with both the voting *and ownership* benchmarks of Section 310(b)(4). Presumably, FTS's approach would also find compliant an arrangement where the parent company issues two classes of stock with disparate voting attributes. For example, if United States citizens held three shares of Class A stock entitled to one vote per share, and an alien held one share of Class B stock entitled to three votes per share, the benchmarks would be satisfied under FTS's theory, since the alien's single share constitutes only 25 percent of the number of outstanding shares of "capital stock", notwithstanding its right to cast 50 percent of the votes.

43. Indeed, THC's own corporate structure provides a vivid example of the potential pitfalls of FTS's methodology. It would allow nominal compliance with the 25 percent statutory ownership benchmark, even though News Corp. has virtually all of the beneficial ownership interest in THC. We agree with FTS that it may be "highly unusual . . . for equity and voting control to reside in different entities." FTS Reply Comments at 74. Nevertheless, when those unusual circumstances do occur, we are not relieved of the obligation to determine the extent and significance of alien ownership interests. We cannot construe the statutory language in a manner that effectively eviscerates the statutory restrictions. Congress could not have envisioned every circumstance that might arise, and where a simple "count the shares" methodology leads to patently absurd results that defeat the congressional intent, we intend to fill any such voids in the law consistent with the underlying congressional purpose. See generally Public Citizen v. Department of Justice, 491 U.S. 440, 454 (1989)(where literal reading of a statutory term would compel an odd result, search must be made for other evidence of congressional intent to lend the term its proper scope).[32]

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[32] Similarly, to the extent that the benchmark's use of the term "capital stock" might be ambiguous, the term's meaning should be ascertained by reference "to the context, the nature and purpose of the statute, its history and other aids to construction." Ray Consol. Copper Co. v. United States, 268 U.S. 373, 376-77 (1925).

44. FTS also contends that Congress's overriding purpose in enacting Section 310(b) was to limit foreign influence and prevent control over licensees. It suggests, therefore, that so long as aliens do not have voting control, we should not be concerned with measuring the extent of alien ownership interests. FTS Comments at 11. We agree that guarding against undue foreign influence and control was an important congressional purpose in enacting Section 310. PrimeMedia Broadcasting, Inc., 3 FCC Rcd 4293, 4294 (1988). Nevertheless, as we concluded in Wilner & Scheiner, "[t]he specific citizenship requirements [of Section 310(b)] governing positional, ownership and voting interest reflects a deliberate judgment on the part of Congress as to the limitations necessary to prevent undue influence." See 103 F.C.C.2d at 517. We must remain faithful to those judgments in determining whether the benchmark thresholds have been met. As discussed more fully below, however, the Section 310(b)(4) benchmark is only a trigger for the exercise of our discretion, which we then exercise based upon a more searching analysis of the circumstances of each case.

B. Capital Contributions as "Capital Stock"

45. Because News Corp.'s true ownership interest in THC is not revealed by simple reference to the total number of shares of stock it holds, we must determine an alternative method for quantifying News Corp.'s ownership of THC's "capital stock." We believe that evaluating News Corp.'s equity capital contributions to the corporation, as we have evaluated limited partnership interests since Wilner & Scheiner, is the best way to quantify the extent of News Corp.'s ownership interest consistent with the congressional intent and the statutory language.

46. Using equity capital contributions to measure ownership interests in corporations is consistent with and reflects the customary method by which corporate ownership interests were measured at the time of Section 310(b)'s enactment. Traditionally, shareholders' ownership interests in corporations correspond to the amounts of their capital contributions. These contributions are acknowledged through the issuance of stock certificates or "shares" that represent those interests. This understanding of corporate structure is reflected in Supreme Court decisions issued around the time of enactment of the Radio Act, when Congress first used the term "capital stock" in limiting foreign ownership of radio stations. In a decision that exemplifies that understanding, Wright v. Georgia R.R. & Banking Co., 216 U.S. 420, 425 (1910), the Supreme Court explained that capital stock "is the capital upon which the business is to be undertaken, and is represented by the property of every kind acquired by the company. Shares are the mere certificates which represent a subscriber's

contribution to the capital stock, and measure his interest in the company."[33] That understanding of the significance of shares of corporate stock has not changed under modern corporate law. See 11 *Fletcher Cyc. of the Law of Private Corporations* §§ 5083 at 24, 5100 at 99-100.

47. Judicial decisions contemporaneous with passage of the statute thus demonstrate an expectation that the relative amounts of shareholder capital contributions would generally be reflected in the stock certificates issued to shareholders, and would measure shareholder ownership interests in corporations. It is likely that Congress had a similar expectation for the relationship between shareholders' capital contributions and the shares of stock issued to them. Accordingly, in those instances when computing the number of shares owned by aliens does not fairly reflect the extent of their ownership interests in a corporation, analyzing the capital contributed from foreign sources is necessary for us to evaluate the extent of alien interests. In this regard, we also note that the statutory language regarding capital stock "owned of record" is not in any way inconsistent with our decision to interpret the benchmark by reference to capital contributions in those instances in which a simple "count the shares" approach does not fairly reflect the extent of alien ownership interests. The legislative history shows that Congress added this language simply to ease the burdens of determining who owned stock in the large, existing multi-national corporations that would be affected by Section 310(b)'s new provisions concerning parent companies.[34] The language thus does not reflect any intention that the Commission should apply the benchmark standard in a manner that would permit licensees or their parent companies to avoid the alien ownership benchmark altogether simply by manipulating the classes or characteristics of corporate stock and numbers of shares that are issued.

48. In summary, it is evident from the legislative history of Section 310(b) that Congress intended the Commission to undertake a *bona fide* assessment of the extent of foreign ownership interests in corporations. Therefore, consistent with congressional intent, we shall construe the statutory benchmark language relating to capital stock in a

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[33] This decision was part of a line of tax cases in which the Supreme Court noted that "capital stock" is not necessarily the same as "shares" of stock. See Ray Consol. Copper, 268 U.S. at 377; Bank of Commerce v. Tennessee, 161 U.S. 134, 146 (1896), modified in other respects, 163 U.S. 416 (1898).

[34] See Hearings Before the Committee on Interstate Commerce, United States Senate, on S. 2910, A Bill to Provide for the Regulation of Interstate and Foreign Communications by Wire or Radio, and For Other Purposes, 73d Cong., 2d Sess. 122-27 (1934). In this case, THC's own records reflect both News Corp.'s ownership of all issued shares of common stock, as well as the equity capital contributed by News Corp. in connection with its ownership interest.

manner that permits a *bona fide* analysis. Where, as here, the ownership of corporate shares does not correspond to the beneficial ownership of the corporation, we will not be bound by a formalistic and formulaic "count the shares" approach that understates the true extent of alien ownership.

49. We recognize that in certain situations, equity capital contributions may not fairly measure the true extent of an ownership interest. For example, such a methodology might not reflect "sweat equity" invested by shareholders, or could present other problems when applied to widely-held corporations. Should such issues arise, we will evaluate them on a case-by-case basis.

50. In the case of THC's corporate structure, however, there is no question that the amount of News Corp.'s capital contribution is a fair representation of the true extent of News Corp.'s ownership interest. For example, through its indirect ownership of Fox, Inc., News Corp. has the right to substantially all of THC's profits and losses and also has the right to all of THC's assets upon its sale or dissolution, less Murdoch's relatively minimal capital contribution and any accrued dividend on his preferred stock. See MMB Ex. 9 at 3-4. Accordingly, we conclude that because foreign interests contributed more than 99 percent of the capital of all classes of THC stock issued, the level of alien ownership of THC greatly exceeds the 25 percent benchmark established in Section 310(b)(4).

C. Mechanics for Exercising Commission Discretion Under Section 310(b)(4)

51. This conclusion does not complete our analysis, however, since Section 310(b)(4) does not set an absolute limit on foreign ownership, but rather gives the Commission discretion with respect to foreign ownership of an applicant's parent company above the benchmark level, "if the Commission finds that the public interest will be served by the refusal or revocation of such license." FTS argues that this discretion may be exercised in order to *limit* foreign ownership, and that alien ownership that exceeds the benchmark is permitted until the Commission makes an affirmative determination to the contrary. Metro NAACP argues that the Commission must affirmatively exercise its discretion to *permit* foreign ownership in excess of the benchmark in the first instance.

52. It is clear that Section 310(b)(4) gives the Commission discretion with respect to alien ownership in excess of the statutory benchmark. It is equally clear that the statute requires that the Commission be made aware whenever foreign ownership could exceed the benchmark level, so that it can exercise that discretion. Congress identified 25 percent alien ownership as the point at which the Commission should render a public interest determination. If the Commission is to exercise its discretion in any meaningful way, it must be alerted to the fact that such discretion is at issue, and given sufficient

facts upon which to make the case-by-case analysis required. See, e.g., Lorain Journal Co. v. FCC, 351 F.2d 824, 830 (D.C. Cir. 1965)("it is needful that the regulatory agencies be alerted and fairly and fully informed upon the emergence of a situation identified as a pressure point by law or regulation"), cert. denied, 383 U.S. 967 (1966); Reconsideration Order, 1 FCC Rcd at 13 (case-by-case procedure ensures that Commission has facts necessary for meaningful public interest determination of questions arising under Section 310(b)(4)). The Commission must be given the opportunity to make a public interest determination specifically focused upon the implications of exercising its discretion *before* an ownership structure above the foreign ownership benchmark is vested with corporate prerogatives over a Commission licensee.

53. If the statute were construed as FTS proposes, it would create a presumption that alien ownership above the 25 percent benchmark is acceptable and in compliance with federal law whether or not specifically reviewed or considered by the Commission. Such a presumption would relieve applicants of the obligation of specifically informing the Commission that their ownership structure exceeded the benchmark, and could thereby deprive the Commission of the opportunity to carry out its statutory duty to determine the public interest.[35] As in all cases of statutory construction, we must look to the provisions of the entire statute, as well as its underlying object and policy. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987). In this case, the statutory policy is clear: foreign ownership above a certain level is of concern and must be scrutinized by the Commission. We must interpret the statute to effectuate the statutory design in terms of the policies behind its enactment, and to avoid an interpretation which would make such policies more difficult to fulfill. See Motor & Equip. Mfrs. Ass'n. Inc. v. EPA, 627 F.2d 1095, 1108 (D.C. Cir. 1979), cert. denied, 446 U.S. 952 (1980). Accordingly, we hold that an applicant must specifically and directly inform the Commission that the ownership structure under consideration may exceed the foreign ownership benchmark, and that absent such explicit notification and an express finding by the Commission that allowing the applicant to exceed the benchmark is in the public interest, an applicant may not exceed the benchmark.

54. Having determined the process required to implement the statute, we have greatly reduced the practical distinction between discretion to limit foreign ownership over the benchmark and discretion to permit it. Once the issue is squarely presented by an applicant, the Commission is charged with determining whether alien ownership above the benchmark is or is not consistent with the public interest. In either case we must make a determination of the public interest, and grant or deny the license

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[35] See Galesburg Broadcasting Co., 6 FCC Rcd 2210 (1991)(transfer of voting stock without prior Commission approval "deprived the Commission of the opportunity to pass on the propriety of alien ownership which Section 310(b)(4) of the Act contemplates").

application based on that determination. But because our process requires submission of the issue to the Commission, failure to do so violates that process even if it does not technically violate the statutory restriction.[36]

55. It is worth noting that in the past the Commission has applied the statute as a presumptive restriction on foreign ownership absent an exercise of discretion, rather than allowing more than 25 percent foreign ownership unless and until the Commission imposes a limitation.

> Under Section 310(b)(4), the aggregate of alien equity interests in a parent corporation, which in turn controls a corporate licensee, may only amount to 25%, unless the Commission finds that the public interest would be served.
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> * * *
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> The provisions of Section 310(b)(4) expressly provide the Commission with discretion to allow levels of indirect alien ownership along a vertical ownership chain in excess of the statutory benchmarks.

PrimeMedia, 3 FCC Rcd at 4295.[37] Although the courts have never been asked to address the issue, they also appear to view the benchmark as a presumptive limit that may be exceeded only with Commission authorization granted in the public interest. See, e.g., Moving Phones P'ship L.P. v. FCC, 998 F.2d 1051, 1057-58 (D.C. Cir. 1993) (Section 310(b)(4) gives the Commission "discretion to depart from a specified level of control"), cert. denied, 114 S. Ct. 1369 (1994); Telemundo, Inc. v. FCC, 802 F.2d 513, 516 (D.C. Cir. 1986) (Section 310(b) "establishes percentage limitations on alien ownership, voting rights, and directorships"). Our holding today will have the

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[36] Thus, an existing licensee whose alien ownership rises above the benchmark in mid-license term through no action of its own is not in violation of the statute, yet must report its alien ownership to the Commission as soon as it becomes aware that the benchmark has been exceeded.

[37] See also, e.g., Univision, 7 FCC Rcd at 6673 (Section 310(b)(4) "limits alien ownership and Board membership to 25 percent"); Reconsideration Order, 1 FCC Rcd at 13 ("The fact that we have discretion to leave unchallenged alien investment above 25 percent in companies controlling a licensee does not negate our statutory obligation to scrutinize the relevant facts before affirmatively determining that the investment comports with the public interest"); Wilner & Scheiner, 103 F.C.C.2d at 524 ("the Commission has the statutory authority to evaluate whether or not, in a particular situation, it is in the public interest to permit a person to obtain or to hold a station license notwithstanding the fact that the alien interests in that station exceed the statutory benchmark").

same effect in practice, since an applicant whose beneficial alien ownership exceeds the benchmark level will have to alert the Commission to that fact, and the Commission will then either grant or deny the license based upon its analysis of the public interest. Therefore, an applicant will be allowed to exceed the Section 310(b)(4) benchmark only after prior consideration by the Commission.

VI. ALLEGED MISREPRESENTATION AND LACK OF CANDOR

56. Having found that FTS's foreign ownership exceeds the statutory benchmark, we must consider whether FTS either misrepresented its compliance with Section 310 in 1985 and in its various applications and filings since 1985, or lacked candor with the Commission concerning the extent of its alien ownership and control.

A. The Parties' Contentions

57. Metro NAACP alleges that FTS deliberately concealed its true ownership structure in all of its representations to the Commission from 1985 until 1994. According to Metro NAACP, this pattern of misconduct was intended to mislead the Commission as to the true extent of alien ownership and control and thereby falsely represent that FTS was in compliance with the benchmark of Section 310(b)(4). As discussed more specifically below, Metro NAACP argues that FTS failed to disclose that THC's preferred stock, which exercises 76 percent of the corporate vote, accounts for less than 1 percent of THC's equity, while the alien-owned common stock, which exercises only 24 percent of the vote, accounts for more than 99 percent of the equity. Metro NAACP contends that the non-disclosure was deliberate and that FTS knew that the relative equity contributions represented by the preferred and common shares was significant in the Commission's determination of compliance with Section 310(b). That intentional failure to disclose relevant information, Metro NAACP argues, continued until May 1994, when FTS for the first time disclosed that News Corp. holds more than 99 percent of FTS's equity.

58. FTS responds that at all times since 1985 it has provided full, complete and accurate information about its ownership structure. FTS claims that the 1985 Application plainly indicated that News Corp. would have a substantial equity stake in FTS, for it stated that News Corp. would contribute all of the funds required to finance the transaction and that the common stock would be entitled to all corporate profits and losses. Those facts, according to FTS, necessarily lead to the conclusion that News Corp. would invest substantial equity in FTS. FTS asserts further that its representatives held extensive discussions with Commission staff both before and after grant of the Application, which ensured that the staff was fully aware of News Corp.'s equity interest. FTS claims that neither legal precedent nor staff inquiry indicated in any way that FTS should provide additional information on News Corp.'s contribution of capital.

B. Legal Standards for Misrepresentation and Lack of Candor

59. A licensee's duty of candor is critical given the FCC's many duties. "The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest, each required to apply for [periodic] renewal[s] . . . . As a result, the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982). There is thus no question that an applicant's candor is an issue of the utmost importance to us. Lack of candor takes two basic forms: (1) misrepresentation, which involves false statements of fact; and (2) failure to disclose, which involves concealment, evasion, or other failures to be fully informative. The duty of candor requires an applicant before the FCC to be "fully forthcoming as to all facts and information relevant" to its application. Swan Creek Communications v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994). Relevant information is defined as information that may be of "decisional significance." RKO General, 670 F.2d at 229. The duty of candor can be breached both by affirmative misrepresentations and by a "fail[ure] to come forward with a candid statement of relevant facts," id., "whether or not such information is particularly elicited" by the Commission or its staff, Swan Creek, 39 F.3d at 1222.

60. A party's "intent to deceive" is, however, an "essential element" of a violation of the duty of candor. Swan Creek, 39 F.3d at 1222; accord Garden State Broadcasting Ltd. P'ship v. FCC, 996 F.2d 386, 393 (D.C. Cir. 1993); Fox River Broadcasting, Inc., 102 F.C.C.2d 1179, 1196 (1986). It therefore follows that before an applicant or licensee may be found to have withheld relevant information, it must be shown that the party knew that the information was relevant and intended to withhold it. See Abacus Broadcasting Corp., 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993) (no lack of candor where filing was misleading, but made without intent to deceive).

61. Metro NAACP's allegations present a *prima facie* case, since they allege particularized facts that, if true, would amount to a serious breach of trust that would be relevant to FTS's basic qualifications as a licensee.[38] To determine whether to renew FTS's license for station WNYW-TV, we must therefore decide whether there is a "substantial and material question of fact" as to whether FTS sought intentionally to conceal material information, or whether there is any other reason that precludes us from finding that renewal of the license would serve the "public interest, convenience, and

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[38] See Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1210-11 (1985), recon. denied, 1 FCC Rcd 421 (1986), modified, 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991).

necessity." If there is, we must designate the renewal application for hearing. 47 U.S.C. § 309(e).

62. We find that although there are some disputed issues concerning certain subsidiary or "proximate" facts, the totality of the evidence before us does not present a substantial and material question of fact on the ultimate issue of FTS's candor toward the Commission. We reach this decision after careful review of the voluminous record and the parties' lengthy submissions.

63. We will discuss each incident of alleged misrepresentation or lack of candor in turn: FTS's 1985 Application to acquire the Metromedia stations, its post-consummation Ownership Report in 1986, FTS's various renewal applications in the period after 1988, and FTS's responses to the Mass Media Bureau's Letters of Inquiry in 1994. At the outset, it will be useful to frame our discussion by briefly summarizing the development of Commission precedent interpreting Section 310(b).

C. A Brief History of the Commission's Construction of Section 310(b)

64. Because FTS's intent turns to some degree on the state of the law at the time it filed various applications, we provide a brief discussion of the chronological development of the Commission's application of Section 310(b). Prior to the time that FTS filed its applications, the Commission's reported decisions relating to compliance by corporate applicants with Section 310(b) determined the amount of alien-held "capital stock" by calculating the percentage of the outstanding shares of stock owned of record by aliens.[39] Indeed, the evidence in this case indicates that in 1985 the staff typically did not inquire about relative equity contributions to an applicant's corporate parent with only voting securities, such as THC. Declaration of Alan Glasser, Mass Media Bureau staff attorney, (Jan. 31, 1993) ¶ 5.[40] Neither did the application form ask the applicant to specify the source of capital contributions to its corporate parent.

65. In a 1985 decision released the day *after* FTS filed its Application, the Commission held with respect to limited partnerships and other *non-corporate* entities that the term "capital stock" should be interpreted "to encompass the alternative means

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[39] E.g., Data Transmission Co., 59 F.C.C.2d 909, 910 (1976) (Section 310(b) satisfied where foreign investor owned 9.5 percent of licensee's shares and 9.67 percent of parent's shares, despite providing additional funding through convertible debt); Westinghouse Radio Stations, Inc., 19 F.C.C. 1359, 1451 (1955) (22.42 percent foreign ownership of shares issued by parent corporation within benchmark).

[40] Sworn declarations from staff members involved in the initial licensing matter were collected in the course of the staff's investigation. See footnote 21, *supra*.

by which equity or voting interests are held in these businesses." Wilner & Scheiner, 103 F.C.C.2d at 516. The Commission applied this definition of "capital stock" in holding that the foreign ownership interest in a limited partnership should be defined "in terms of the equity contributions of the limited partners." Id. at 520 n.42.

66. Our conclusion in Wilner & Scheiner relied for certain propositions on an *unpublished* letter ruling issued in January 1985 by the Mass Media Bureau to American Colonial Broadcasting Corporation ("American Colonial").[41] That staff ruling involved a proposed corporate ownership structure in which the vast majority of the necessary capital would be contributed in return for non-voting preferred stock, but the common stock would nonetheless hold all of the voting power. The Bureau concluded that the proposed ownership structure exceeded the 25 percent benchmark established by Section 310(b)(4). As an independent ground for its conclusion,[42] the Bureau determined that the total capital invested by a foreign investor, as a percentage of the total capital invested in both classes of stock combined, would be 28.7 percent, and therefore in excess of the benchmark standard for foreign ownership. American Colonial at 5.

67. Upon reconsideration of Wilner & Scheiner in October 1986, the Commission further refined the concept of "capital stock" in two important respects. First, the Commission held that non-voting preferred stock could not be disregarded in determining compliance with Section 310(b)(4), even if the applicant certified that such stock contained none of the indicia normally associated with equity ownership, because the term "capital stock" encompasses various classes of stock, including preferred stock. Reconsideration Order, 1 FCC Rcd at 13-14. Second, the Commission confirmed that it would define ownership interests in a limited partnership in terms of the equity contributions of limited partners, rather than in terms of their partnership share, in part because the allocation of partnership shares had the potential for manipulation and could seriously understate the actual equity interest held by an alien. Id. at 14.[43]

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[41] In Wilner & Scheiner, we cited to American Colonial on points unrelated to the use of capital contributions to determine compliance with the ownership benchmark. See 103 F.C.C.2d at 517 n.32, 519 n.37. The same is true for our citation of that letter ruling in Univision, *infra*. See 7 FCC Rcd at 6679.

[42] The Bureau's first ground for rejecting the proposed ownership structure was the fact that a total of 27.28 percent of the common stock -- the only voting stock -- was attributable to aliens. American Colonial at 3-4.

[43] In PrimeMedia Broadcasting, Inc., 3 FCC Rcd 4293 (1988), we extended the rationale of Wilner & Scheiner to irrevocable voting trusts for corporate stock with foreign beneficiaries, since "we do not believe that Congress intended to exclude equitable ownership interests which do not confer actual control from the scope of

68. The first published decision to examine alien equity holdings in order to evaluate corporate compliance with Section 310(b) was Univision Holdings, Inc., 7 FCC Rcd 6672 (1992), recon. denied, 8 FCC Rcd 3931 (1993). There, the Commission determined compliance with Section 310(b) based in part upon the combined equity contributions of alien investors in the corporate holding companies of two proposed licensees. A United States citizen was to have 75.12 percent of the voting stock of the licensees' parent corporations, and two foreign corporations were to vote 12.44 percent each. Id. at 6673. In determining that the proposed corporate structure was "fully consistent with" the benchmark established in Section 310(b)(4), however, the Commission also specifically found that the combined *capital contributions* to the corporate parents were made 75.8 percent by the United States citizen, and 12.1 percent by each of the foreign corporations. Id. at 6673 n.6.

69. With this background in mind, we proceed to an evaluation of FTS's alleged lack of candor over the last decade.

D. FTS's 1985 Application

1. The Parties' Contentions

70. Metro NAACP alleges that FTS's deceptions about its foreign equity ownership began with its initial applications to acquire the Metromedia stations in 1985. Metro NAACP contends that in 1985 News Corp. knew that the Commission would examine an applicant's equity structure in order to determine compliance with Section 310(b), but the Application neither disclosed directly that News Corp. would hold all of the equity in the proposed enterprise nor made it possible for the Commission to determine the relative equity interests of the foreign and domestic investors.

71. Two exhibits to the Application are pertinent to Metro NAACP's argument. First, Exhibit 1, which described the proposed ownership structure, disclosed that Rupert Murdoch would exercise 76 percent of the vote through his ownership of THC's preferred shares and that News Corp. (through subsidiaries) would have 24 percent of the vote through its ownership of THC's common shares. It indicated that the preferred stock would be entitled to an unspecified fixed return and that all remaining profits and losses would be attributed to the common stock. Exhibit 1 mentioned nothing about the price that would be paid for either class of stock, the relative capital contribution between the two classes, or the benchmarks of Section 310.

Section 310(b)." Id. at 4295.

72. Second, Exhibit 2 to the Application, called the "Source of Funds" exhibit, indicated that to complete the proposed transaction, THC would require approximately $600 million (above the assumption of debt), to be provided by various unidentified subsidiaries of News Corp. Exhibit 2 further stated that any money borrowed from foreign banks would be contributed as capital, and any money borrowed from domestic banks would be contributed either as capital or as debt. The exhibit did not, however, specify what proportion of the money would take which form. Moreover, like Exhibit 1, the Source of Funds statement does not reveal how much would be paid for either class of stock or the relative capital contributions, nor does it discuss the Section 310 benchmarks.

73. Metro NAACP contends that the two exhibits fail to describe accurately the structure of FTS because they leave ambiguous the critical issue of relative equity contributions between the two classes of stock. Metro NAACP asserts that the inadequate disclosure was deliberate, because under the law as it existed in mid-1985 FTS knew that the Commission considered equity contributions to be relevant in assessing compliance with the alien ownership benchmarks, and because a credit facility under which News Corp. planned to borrow the money required News Corp. to provide the funds as capital and not as debt. Thus, claims Metro NAACP, the Application deliberately obscured the extent of alien equity ownership in THC.

74. FTS's response to this charge has taken various forms. In the course of the Philadelphia proceeding, FTS made two arguments, one that it has continued to press and one that it no longer advances. The first argument, which FTS has always maintained, is that the Application "made it clear from the outset that News Corp. . . . would indirectly provide substantial equity to THC." MMB Ex. 31 at 8. FTS bases that argument on its disclosures that News Corp. would contribute the entire $600 million needed to close the transaction and would be entitled to all of the profits and losses of the licensee. The second argument is that "notwithstanding the substantial foreign equity ownership of THC, the proposed structure was not inconsistent with the public interest," id at 9, and that when the Commission approved the Metromedia transaction, it necessarily approved THC's alién equity level, id. at 12-13. That argument implies that FTS had informed the Commission that foreign ownership of THC exceeded the 25 percent threshold and that the Commission had approved the overage.

75. In its current pleadings, FTS has replaced its earlier second argument with the assertion that it is and always has been in compliance with Section 310(b), because that section governs only alien-owned *shares* of stock and does not limit the amount of foreign *equity capital* in a Commission licensee or its corporate parent. Thus, FTS now argues that its equity structure was not relevant to the Commission's approval of the Application, and FTS could not have had any intent to withhold relevant information.

76. We find that FTS did not intentionally lack candor in its 1985 Application, but on grounds somewhat different from those FTS has put forward. We find that the level of News Corp.'s equity capital contribution to THC was not clearly revealed in the Application, and that the Commission staff did not glean that fact from the other information disclosed. Nevertheless, we determine that any deficiency in the information provided does not reflect an intent to deceive because, under the state of the Commission's reported precedent in 1985, a reasonable applicant would not have been on notice that alien capital contribution was a material consideration. Thus, even though FTS failed to provide that information, the failure did not constitute a culpable lack of candor.

2. The Efficacy of FTS's Disclosures

77. Initially, we reject FTS's contention that the Application fully revealed the extent of alien equity contributions, as well as its argument that the Commission understood or approved the level of alien ownership. The Application does not expressly state that a foreign company would contribute more than 99 percent of the licensee's equity. Rather, although the Application indicates that News Corp. would supply the requisite funds, it does not state whether those funds would be provided as equity or debt, and we see no way in which to divine the extent of News Corp.'s capital contribution to THC. The distinction between equity and debt is a crucial one; because creditors do not possess an ownership interest, the Commission does not consider debt interests in determining compliance with the statutory ownership benchmark. Wilner & Scheiner, 103 F.C.C.2d at 519.[44] To the extent that one can determine anything about alien equity from the application, that is possible only by closely analyzing isolated parts of the Application and drawing an appropriate inference. That is precisely the type of inferential analysis the Commission should not have to perform. See WADECO, Inc. v. FCC, 628 F.2d 122, 128 (D.C. Cir. 1980) (burden is on the applicant to supply all information and not on the Commission to infer significant additional information).

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[44] FTS has also submitted a "representative sample" of contemporaneous articles from the popular and trade press in 1985 to support its assertion that, "from the earliest public disclosures of the transaction, it was common knowledge that [News Corp.] would provide the funds necessary to complete the acquisition. See Letter from William S. Reyner to Charles Dziedzic (Feb. 3, 1995). To the extent the proffered articles discuss funding of the transaction, they, like the Application itself, provide no information concerning relative equity capital contributions and therefore do not support the contention that the precise financial details of the transaction were "common knowledge." Indeed, many of the articles indicate that Murdoch himself would provide the money to fund the acquisition.

78. Although FTS has focused on a small number of exhibits to the three-inch-thick Application, it is important to bear in mind that the issues involved in processing the application were complex and largely unrelated to alien ownership, such as television/newspaper cross-ownership, the sufficiency of financial certifications, and the sufficiency of disclosures of planned changes in programming. Metromedia, 102 F.C.C.2d at 1339-40. For that reason, we reject the conclusions of FTS's "expert," Professor Marvin Chirelstein, that the conclusion that News Corp. would provide "the vast preponderance of the equity funding to be received by THC . . . as paid-in capital" was "perfectly evident on a plain reading of the 1985 Applications and related documents." FTS Comments, Appendix A at 4. Professor Chirelstein reviewed only a fraction of the documents submitted to the Commission focussing on the single issue of alien capital contributions, and reached his conclusion with the benefit of hindsight. Our candor requirements cannot be judged by such a standard. Moreover, Professor Chirelstein's opinions are based in part upon information concerning the nature and extent of Murdoch's investment in THC that had *not* been made available to the Commission at the time it had the Application under consideration.

79. It appears that the Commission staff did not understand at the time of the Application that 99 percent of the equity capital would be supplied by News Corp. For example, Roy Stewart, Chief of the Video Services Division in 1985, stated in a declaration that "[a]t no time was I aware the News Corporation would own 99 percent of the licensee's equity." Stewart Dec. ¶3. Stephen Sewell, then Assistant Chief of the Video Services Division, has similarly stated that he did not know the extent of the foreign equity holdings. Sewell Dec. ¶4.[45] Alan Glasser, the Commission employee who drafted the Metromedia decision, likewise stated that he did not know in 1985 that News Corp. would hold 99 percent of the equity. Glasser Dec. (Jan. 12, 1995) ¶4. See also Aronowitz Dec. ¶2 ("I do not recall having an impression as to whether the funds contributed by News Corp. would be in the form of equity or debt."); Fritz Dec. (Jan. 13, 1995) ¶5 (no recollection of discussions about how licensee was funded or debt/equity question).

80. Our assessment of the staff's beliefs in 1985 is not undermined by supplemental declarations submitted by two staff members. In the second declaration of Alan Glasser, he states that he "now recall[s]" that "News Corp. (through various subsidiaries) was to put up all the required cash and would receive all of the profits and losses;" and that the Application "clearly showed that control was to rest with Mr. Murdoch and that News Corp. would have all the equity benefits and risks in exchange

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[45] Had they known of the extent of alien equity, Stewart would have inquired further about News Corp.'s interests, while Sewell stated he would have recommended against granting the Application. See Stewart Dec. ¶3; Sewell Dec. ¶4.

for putting up all the money." Glasser Dec. (Jan. 31, 1995) ¶¶3, 4.[46] The second affidavit does not contradict the first one because the first involves Glasser's recollection of what he knew in 1985, while the second involves how Glasser now regards the Application after a detailed briefing by counsel for FTS and a review of relevant documents. That reasoning also applies to the Jerald Fritz, who was Chief of Staff for Chairman Mark Fowler in 1985. In any event, we agree with Metro NAACP that the issue is not whether the application disclosed facts from which with some effort relevant information could be derived, but whether the relevant information was disclosed forthrightly.

81. Our conclusion that Commission employees apparently did not know the extent of alien equity capital contributions is buttressed by the Commission's decision approving the acquisition, which is wholly devoid of any discussion of the matter. Neither was the issue squarely raised by any of the petitioners to deny,[47] or addressed in the staff's memorandum briefing the Commission on the case. Nor apparently did any Commission employee ask any questions about foreign equity, though with the benefit of hindsight the Application seems to invite further questions. Nothing else in the record indicates in any way that any Commission employee was aware of the extent of foreign equity contributions to FTS at the time the Application was processed and approved.

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[46] Other Commission employees, including James McKinney and Jerald Fritz, have indicated their recollection that Murdoch's *de facto* control of News Corp. assuaged any Commission concerns about alien influence over the licensee. McKinney Dec. ¶3; Fritz Dec. (Jan. 13, 1995) ¶5. We note, however, that the Metromedia decision makes no explicit finding that Murdoch has *de facto* control of News Corp., although it states that Murdoch "controls" FTS, that 46 percent of News Corp.'s stock is "controlled by and for the benefit of the Murdoch family" through a trust, and that no other shareholder holds more than 5 percent of News Corp.'s stock. See 102 F.C.C.2d at 1336-37.

[47] FTS asserts that one of the petitions to deny filed in 1985 contested the level of foreign investment in THC and FTS. The cited petition alleged that, "[a]lthough Murdoch is the controlling party, a substantial interest in the proposed transferee will be held by a publicly traded Australian company." Doc. A-10 at 3. The Application itself clearly states that News Corp., an Australian company, will hold 24 percent of the voting stock of THC, which gives the company "a substantial interest" in THC and FTS. It is significant that the above quotation from the petition appears in the "Citizenship" section of the petition, and not in the later "Source of Funds" section. Doc. A-3 at 5. Had FTS truly felt that this petition to deny raised an issue as to the source of its capital, it would have addressed that issue in its contemporaneous response -- which is silent on the issue. See Doc. J-6. Therefore, we find this assertion to be erroneous.

3. The State of the Law in 1985

82. Despite our conclusion that the Application did not plainly disclose the extent of News Corp.'s equity capital interest in THC, we do not find that the record presents a substantial and material question concerning whether FTS intentionally concealed the extent of alien capital contribution in connection with its Application in 1985. Metro NAACP's argument is predicated on the theory that in 1985 the state of the law was such that FTS knew or should have known that the Commission used relative equity contributions, rather than relative stock shares, in determining a corporate licensee's compliance with the 25 percent threshold of Section 310(b)(4). We find that our reported decisions at the time the Application was filed would not necessarily have led a reasonable applicant to that conclusion and that FTS did not in fact draw that conclusion. Thus, in reaching a decision regarding FTS's candor, we draw distinctions between first, the actual state of the law, as revealed in both reported and unreported Commission decisions; second, what a reasonable applicant could be expected to know about the law; and third, what FTS in fact knew about the law at the time.

83. At the outset, we note that in 1985 the staff's unreported decision in American Colonial determined that equity capital contribution was a relevant consideration in calculating alien participation in a corporate context. Thus, case law at the staff level in 1985 was that equity contribution was a relevant measure of ownership for purpose of determining compliance with the alien ownership benchmarks in Section 310(b) of the Act. For purposes of a candor determination, however, this conclusion is not sufficient, for it is what an applicant could be reasonably charged with knowing about the law and what it actually knew that inform our view of an applicant's intent and thus our view of its candor.

84. We turn now to those latter two considerations. We conclude that in 1985 when it planned its corporate structure and when it described that structure to the Commission, FTS was entitled to rely on the Commission's reported decisions concerning alien equity participation in the corporate context, which had to that point in time looked to the number of shares held and not to equity contributed.[48] Thus, with 76 percent of the shares of THC stock owned by U.S. citizens and 24 percent of those shares owned by aliens, it was not unreasonable for FTS to believe that it fully complied with the 25 percent benchmark established in Section 310(b)(4). Indeed, multiple attorneys who helped prepare the Application have testified that they believed FTS to be in compliance with the Section 310(b)(4) benchmark, regardless of News Corp.'s equity

[48] There is no indication that those reported decisions involved any disparity between the relative number of shares held and the relative amount of capital contributed to the corporation. See footnote 39, *supra*.

contribution.[49] And as noted, no Commission employees appear to have focused on the issue in 1985. We thus agree with FTS that at the time of its Application, a reasonable person could not have been expected to know that the percentage of alien equity in a corporation, as opposed to the percentage of shares of stock, was of "decisional significance." Accordingly, FTS cannot be found to have lacked candor to the extent it did not provide that information in 1985.

85. We disagree with Metro NAACP's contention that in 1985 the law "gave clear notice that equity contribution was material." Rep. Comments at 56. Although the January 1985 American Colonial letter ruling was written before FTS filed its Application, we find that American Colonial would not have put a reasonable applicant on notice that the Commission considered equity contribution relevant to the statutory benchmark. Because the letter ruling was an unreported advisory letter, notice of the decision cannot be automatically attributed to licensees. Just as important, the evidence indicates that FTS attorneys in fact were not aware of American Colonial in 1985. Levy Dep. at 21; Siskind Dep. at 45-46. In the circumstances, we find both that FTS was unaware of the American Colonial decision and that a reasonable applicant in 1985 could not be charged with knowledge of that unreported ruling. See 47 C.F.R. § 0.445(e) (unpublished documents "may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question").

86. We also disagree with Metro NAACP's further contention that Wilner & Scheiner, released the day after the Application was filed, "clearly confirms that the limitations on 'capital stock' ownership apply to alien equity contribution," and that FTS therefore should have disclosed its relative equity structure when it twice amended its Application after June 1985.[50] In Wilner & Scheiner, we responded to a petition for declaratory ruling asking us to hold that limited partnership interests would not be counted as "capital stock" for purposes of determining whether a licensee was in compliance with the Section 310(b) ownership benchmarks. We rejected that request and held instead that *limited partnership interests* are subject to the foreign ownership benchmarks even though they are not corporations and therefore do not have "capital

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[49] Squadron Dep. at 66-67; Siskind Dep. at 28, 34; Levy Dep. at 29, 31, 40-41; Madden Dep. at 28; Denvir Dep. at 34-35; Hayes Dep. at 39-40.

[50] Metro NAACP argues that the use of words such as "equity" and "control" in handwritten notes of FTS attorneys proves that they knew that the Commission would draw a distinction between debt and equity for the purpose of determining compliance with the benchmark of Section 310(b). See MMB Exs. 20, 21. We do not draw the same inference from those notes in light of our foregoing discussion of the state of the law. At the time of the 1985 Application, there is no reason to believe that FTS would have known of the future evolution of our case law.

stock" within the literal meaning of the statute. In the absence of actual capital stock, we decided, benchmark compliance would be determined based upon the limited partners' contributions to the equity of the licensee. See 103 F.C.C.2d at 515-16. On its face, therefore, the ruling pertains only to limited partnerships.

87. The ruling, though it cited the unreported American Colonial decision, does not in any way discuss how ownership interests should be calculated for corporate applicants, let alone hold that such interests must be determined on the basis of relative capital contributions. We thus believe that a corporate applicant in 1985 could reasonably have believed equity contributions to be immaterial to the Commission's consideration of an application.[51] Indeed, in the course of this renewal proceeding, Metro NAACP itself has argued to us that "the full Commission has never explicitly stated that equity contribution must be arithmetically calculated in the context of acquiring a corporate licensee." Supplement to Petition to Deny at 6 n.1.[52]

88. That is not to say that Wilner & Scheiner would not have led an applicant or its counsel to surmise that the Commission, at some point, might well conclude that equity contribution would be deemed relevant to determining the benchmark compliance of a corporate applicant or licensee.[53] Indeed, as discussed below, FTS's counsel came

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[51] We disagree with Metro NAACP's contention that the petition for a declaratory rulemaking that led to the Wilner & Scheiner decision, which counsel for FTS had read and discussed, by itself was sufficient to put FTS on notice that equity was pertinent. The petition, like the opinion it produced, addresses only limited partnerships. We also disagree with the argument that simply because Wilner & Scheiner cites the unreported American Colonial letter in several footnotes, FTS should have known about the Bureau's decision in that matter. Just as important, nothing in the record indicates that FTS in fact was aware of the American Colonial decision.

[52] We also note that in 1985 FTS appears to have considered various forms of ownership, such as limited partnerships (MMB Ex. 17) and voting trusts (MMB Ex. 25), see Siskind Dep. at 16 (both), but rejected them due to problems of alien equity ownership (Levy Dep. at 39 (voting trusts); Squadron Dep. at 23 (limited partnership)), which suggests that at the time FTS and its counsel believed that Wilner & Scheiner applied only to limited partnerships. See also Siskind Dep. at 22 (in 1985 "we believed as a matter of law that it didn't make any difference how the money went into the company"); id. at 18, 36.

[53] For example, in a 1990 law review article relying solely on an analogy to Wilner & Scheiner, the authors wrote that "equity ownership among classes of stock for a recently incorporated company may be determined by the proportion of paid-in capital or equity contribution." R. Gavillet, J. Foehrkolb, & S. Wu, *Structuring Foreign Investments in*

to precisely that conclusion some time after 1985, and they advised FTS in 1988 that the Wilner & Scheiner rationale could apply to corporations. See ¶¶111-15, *infra*. But we cannot say that the failure in 1985 to make more explicit disclosures to the Commission regarding alien equity contributions violates the duty of candor.

89. Finally, we reject Metro NAACP's suggestion that Data Transmission Company, 59 F.C.C.2d 909 (1976) ("Datran III"), indicates that the Commission would measure benchmark compliance with respect to capital rather than shares of stock. Datran III concerned *control* of a licensee and not calculation of benchmark compliance, and must be interpreted in that context. Thus, the opinion's reference to a comparison between the alien's equity investment and the nominally controlling party's investment was made only in the context of our analysis of *de facto* control of the licensee; indeed, the opinion notes that the alien's stockholdings were within the benchmark, a determination that appears to be based on a "count the shares" approach. See 59 F.C.C.2d at 910.

90. We thus conclude that at the time FTS filed and amended its Application a reasonable applicant would not have been on notice that alien equity contributions, as opposed to alien shareholding, must be considered in determining compliance with Section 310(b) and that FTS was, in fact, not aware that equity contributions were relevant. Thus, to the extent that FTS did not provide that information in its Application, its absence was not an intentional withholding of information known to be material to the Commission's decision.

4. Other Evidence Inconsistent With Intent to Deceive

91. In addition to the existing legal regime upon which FTS was entitled to rely, the record in this case is inconsistent with a finding that FTS intended to withhold relevant information in the Application. First, we are unable to discern any motive for FTS to conceal the facts of its ownership in 1985. Compare RKO General, Inc., 670 F.2d at 230 (finding of lack of candor reinforced by presence of motive); see WMOZ, Inc., 36 F.C.C. 202, 209 (1964),(motive always an issue in misrepresentation cases). The Metromedia transaction required the Fox companies to commit to $1.6 billion in financing and required Rupert Murdoch to change his citizenship. At the same time, the record shows, because News Corp. could have received FTS's profits either as interest payments or as stock dividends, the company was indifferent to whether its $600 million contribution took the form of debt or equity. Siskind Dep. at 101. Accordingly, as one of the FTS lawyers testified, had FTS believed that it made a difference which way the

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FCC Licensees Under Section 310(b) of the Communications Act, 27 Cal. W. L. Rev. 7, 25 (1990).

money was contributed, the contribution would have been structured so as to conform with the statute. Id. at 24, 31; see also Sarazen Dep. at 50-51.[54] In those circumstances, it seems highly unlikely that FTS would have deliberately created a structure that it knew exceeded the benchmark, and then intentionally concealed that information.

92. Moreover, FTS did in fact disclose that News Corp. would provide $600 million, which was described as the funds needed to close the deal. Setting aside the question of debt versus equity, the Application surely indicates that the funding necessary for the Metromedia transaction was to come from News. Corp.[55] Moreover, the Application explained that News Corp. was entitled to all of the profits from FTS's operations as well as all net assets on dissolution of the company. News Corp.'s financial participation thus plainly gave it benefits typically associated with equity holdings. In light of those disclosures, and given the state of the law at the time, we find that FTS's failure to be more explicit did not reflect an intent to avoid scrutiny of News Corp.'s financial stake in FTS, which, even if not relevant to the statutory benchmark, might have raised questions of *de facto* control of FTS. E.g., Channel 31, Inc., 45 R.R.2d 420 (1979).

93. Furthermore, the record shows that FTS representatives met with both Commission staff and Commissioners concerning the Application both before and after its filing, in which they described the interests of News Corp. and sought the staff's approval.[56] One former Commission employee has stated that FTS attorneys always quickly provided information requested by the staff. Glasser Dec. (Jan. 31, 1995) ¶8. Those actions are inconsistent with an intent to deceive, but consistent with a desire to ensure that the Commission had whatever information it needed to approve a very important transaction.

94. Contemporaneous documents corroborate the testimony. For example, the record contains Arthur Siskind's April 29, 1985 notes (MMB Ex. 25) of a telephone

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[54] We reject Metro NAACP's suggestion that News Corp. could not have raised the money as a debt contribution. The uncontradicted testimony is to the contrary. See Sarazen Dep. at 38, 51-54; DeVoe Dep. at 17; Denvir Dep. at 11, 21; Siskind Dep. at 18, 23-24.

[55] Metro NAACP recognized this point in its Petition to Deny the Philadelphia license, where it argued that, in light of the "Source of Funds" statement, "the acquisition was openly acknowledged to be financed by an alien company and its subsidiaries."

[56] Gardner Dep. at 12-17, 28-30, 33, 61-63, 78-79; Denvir Dep. at 37-38; Levy Dep. at 34; Squadron Dep. at 60-61; Siskind Dep. at 18, 29-30, 49-50, 52.

conversation with another FTS attorney, Joel Levy, which indicate that Levy met with Roy Stewart and other FCC personnel in order to solicit their views on the validity of a trust arrangement. See Siskind Dep. at 94-96. Similarly, a June 7, 1985 "checklist" on the assignment prepared by FTS's attorneys indicates that an FTS attorney was to "follow-up with Roy Stewart explaining the financial structure of the deal." MMB Ex. 45. An intention to "vet" the details of FTS's ownership structure with the Commission's staff, whether or not realized, is inconsistent with an intent to conceal.

95. There is, however, one piece of evidence in the record that appears to contradict our conclusion that FTS did not believe that it exceeded the 25 percent ownership benchmark. FTS attorney Michael Gardner has testified that he believed in 1985 (and at all times thereafter), and that other FTS attorneys understood at the time, that News Corp.'s ownership of THC exceeded the 25 percent benchmark.[57] If that were the case, the duty to provide information would have required FTS expressly to inform the staff that the benchmark would be exceeded. But when we assess Gardner's testimony in context and against the other evidence in the record, including his own contemporaneous written work product, we cannot conclude that his testimony alone raises a substantial issue of fact.

96. First, at his deposition, Gardner explained that his belief in 1985 that FTS's foreign ownership exceeded the benchmark was not based upon an assessment of the amount of News Corp.'s capital contributions or on any knowledge that the Commission would draw a distinction between equity and debt. Rather, Gardner testified that his conclusion that News Corp. would hold more than a 25 percent interest in FTS was based entirely on News Corp.'s entitlement to all profits and losses of the licensee – which was disclosed in the Application. Gardner Dep. at 10-11, 21-22, 24-26. Indeed, Gardner did not even know the amount of News Corp.'s equity stake, the size of which was decided after the Application had been approved and without Gardner's advice. Id. at 10, 16-17, 30. It thus does not appear that Gardner knew in 1985 that the Commission would draw a distinction between equity and debt or that foreign equity contributions to FTS would exceed 25 percent. As such, he could not have shared that knowledge with his client or his co-counsel, who therefore had no corresponding reason to believe that additional information should be provided to the Commission.[58]

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[57] See Gardner Dep. at 10-11, 21-22, 24-26.

[58] Gardner also testified that he could not recall any discussions in 1985 with FTS attorneys or employees concerning whether News Corp.'s equity interest could be considered "capital stock" relevant to the Section 310(b)(4) benchmark, or that he even used the term "capital stock." Gardner Dep. at 78. Indeed, Gardner testified that he considered benchmark compliance a "non-issue" in light of the Commission's focus on Murdoch's *de facto* control of News Corp.

97. Second, Gardner's testimony that he believed that FTS exceeded the benchmark in 1985 is inconsistent with his written advice to FTS in 1988. Then, Gardner told FTS in an opinion letter that, in light of the Commission's decision in Wilner & Scheiner, "News Corporation's interest in Fox . . . *could be construed* as exceeding the 25 percent benchmark of Section 310(b)(4)." MMB Ex. 1 at 3 (emphasis added). As indicated above, we believe that one could well have perceived that Wilner's rationale might ultimately be extended to corporations and have advised his client accordingly. We find it unlikely, however, that an attorney who believed -- and who had advised his client in 1985 -- that the client's alien ownership in fact exceeded the Section 310(b)(4) benchmark would, three years later, provide the very same client with the plainly qualified advice that its ownership *could be construed* to exceed it.

98. Every other person who participated in the Metromedia acquisition -- including Gardner's own law partner at that time -- testified that they believed FTS to be in compliance with the 25 percent benchmark.[59] All of these persons testified further that none of the participants in the transaction, including Gardner, had suggested at any time that News Corp.'s ownership of the "capital stock" would exceed 25 percent.[60] Likewise, pertinent Commission personnel have stated that they had a consistent understanding. See ¶79, *supra*.

99. In sum, we find that the evidence is overwhelmingly inconsistent with a finding that FTS knew in 1985 that it was exceeding the benchmark. We hold that the totality of the evidence does not raise a substantial question as to FTS's belief in 1985 that its alien ownership did not exceed the 25 percent benchmark. That determination is well within our authority to "determine how much weight to accord disputed facts" in the record before us. Astroline, 857 F.2d at 1561.

E. 1986 Ownership Report

100. We turn next to Metro NAACP's claim that FTS also deceived the Commission in its 1986 Ownership Report. The Report indicated that Murdoch had acquired 5,100 shares of THC preferred stock for $510,000 on December 20, 1985, that

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[59] See footnote 49, *supra*.

[60] E.g., Levy Dep. at 19, 31; Denvir Dep. at 34; Siskind Dep. at 28-30, 33. Even Gardner does not recall any actual discussion of the equity issue with anyone at FTS or News Corp. Gardner Dep. at 77-79.

Barry Diller had acquired 2,500 preferred shares for $250,000 on that same date,[61] and that Fox, Inc., held all 2,400 shares of THC's common stock. MMB Ex. 13 at 15. In the space on the form asking for the total consideration paid for those common shares, FTS referred to an attached Exhibit 3, which stated "[t]he total consideration paid in connection with the transaction is described in the Asset Purchase Agreement filed as part of the above reference[d] Assignment Applications." Id. at 18. That Agreement did not specify the consideration that Fox, Inc. paid for its stock, but gives the total cost of the Metromedia acquisition.

1. The Parties' Contentions

101. Metro NAACP claims that the report is misleading (and therefore constitutes a lack of candor) because it fails to state that News Corp. contributed $425 million to THC's capital despite an express instruction on the form to state the "total consideration paid (if other than cash, describe fully)" for THC's common stock. Instead of specifying $425 million in the appropriate space, FTS referred to an "Exhibit 3." That exhibit in turn did not provide the capital contribution data, but stated that "to the extent the subject holdings were not obtained in connection with [the Metromedia] transaction, this report does not reflect the . . . purchase price paid." In other words, according to Metro NAACP, FTS simply failed to provide the information requested, which constitutes a lack of candor. Metro NAACP sees this omission as part of an overall coverup of THC's equity structure that began with the Application the previous year.

102. In response, FTS argues that the omission does not constitute a lack of candor because, as revealed in the deposition testimony of Thomas Herwitz, the report's preparer, Commission staff had told him that they were not concerned with the amount that had been paid for the THC common stock as opposed to the total amount involved in the acquisition of the Metromedia stations. Indeed, FTS asserts, a literally correct response to the question of how much Fox, Inc. paid for the shares -- $24,000 -- would itself have been misleading. Moreover, FTS asserts that it filed Ownership Reports not just for itself, but for all of its parent companies up to News Corp., even though the Commission's rules required reports only for FTS and THC, an action, says FTS, inconsistent with an intent to conceal information.

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[61] At the time, Diller was Chairman and Chief Executive Officer of Fox, Inc. Diller Dep. at 4. In 1992 he sold his shares of THC preferred stock to Murdoch for $250,000, their par value. MMB Ex. 7 at 2 n.2; MMB Ex. 13 at 11.

2. Discussion

103. We find that although FTS's Ownership Report did not disclose that News Corp. had contributed $425 million in capital to THC in exchange for its 24 percent ownership interest, the record does not support a finding that the non-disclosure was due to an intentional lack of candor.

104. The record shows that the Ownership Report was prepared by Herwitz, a former FCC employee who was legal assistant to the FCC Chairman shortly before he went to work for FTS. Herwitz testified that he had never before prepared an ownership report and that he accordingly did not know precisely what information the Commission was looking for in response to the "consideration paid" question. Herwitz testified that he was confused on this point because the Metromedia acquisition had been highly complex, involving not only News Corp.'s supplying money to FTS, but also FTS's assumption of the pre-existing billion dollar debt of Metromedia. Herwitz Dep. at 31-32.

105. Herwitz testified, and the evidence gathered from Commission staff corroborates, that he therefore sought guidance on that question (and others) from the staff of the Mass Media Bureau, who indicated that he should provide the total consideration paid in connection with the Metromedia acquisition. Herwitz Dep. at 40-42; Glasser Dec. (Jan. 31, 1995) ¶7. Herwitz did so by referring to the Asset Purchase Agreement with Metromedia, which set forth what Herwitz believed to be the requisite answer. Herwitz's report with respect to Fox, Inc.'s shares of THC is consistent with the report with respect to THC's shares of FTS, for which Herwitz stated in response to the same question that "[t]he total consideration paid in connection with the transaction was in excess of $1.6 billion and is described more fully in the Asset Purchase Agreement filed as part of the above referenced Assignment Applications." This consistency supports Herwitz's testimony on this point.

106. His action is arguably consistent with the instructions on the form, which direct the preparer to specify any non-cash consideration, which Herwitz may have interpreted to mean assumption of debt. Herwitz testified that he specified the consideration paid by Murdoch and Diller because he had been told by the staff that the amounts paid by the attributable shareholders should be specified, whereas for Fox, Inc., the non-attributable shareholder, the Commission was interested only in the total amount of the transaction. Id.

107. Furthermore, the record provides no reason to believe that Herwitz's response had anything to do with alien ownership. As we have discussed above, in 1985 and 1986 a reasonable applicant would not necessarily have known that corporate equity contributions were relevant factors in assessing compliance with Section 310(b).

Moreover, FTS had already informed the Commission in its application that it expected News Corp. to contribute the $600 million necessary to complete the transaction as either debt or equity.[62] Without knowledge that the distinction between the two had any significance for purposes of assessing compliance with Section 310(b), Herwitz would have had no reason to withhold information on equity funding. Although under the circumstances we conclude that Herwitz completed the form in good faith, his response was imprecise, and we believe that the most meaningful response to the question would have been to specifically refer to the $425 million capital contribution that News Corp. ultimately provided to THC.[63]

108. We find that the uncontradicted record evidence shows that Herwitz acted in good faith and that, even if he did not disclose what we in retrospect believe to be important information, he had no intent to withhold material facts.[64] The totality of the circumstances surrounding FTS's 1986 Ownership Report thus does not raise a substantial and material question of fact that warrants a hearing.

F. *Renewal Applications Filed Since 1988*

1. The Parties' Contentions

109. Metro NAACP contends that three internal FTS documents written between 1988 and 1990 demonstrate that by this time FTS knew that its alien equity ownership exceeded the Section 310(b)(4) benchmark, yet failed to disclose its 99 percent alien equity to the Commission in any of the numerous renewal applications filed during that time, all of which certified that FTS was in compliance with Section 310(b). The first document is a 1988 opinion letter written by Gardner that, according to Metro NAACP,

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[62] News Corp. ultimately contributed not $600 million but approximately $425 million.

[63] Herwitz also indicated in the second paragraph of Exhibit 3 that the Ownership Report did not reflect the amount paid for the common stock apart from the transaction, a figure Herwitz said he did not know. See Herwitz Dep. at 39. FTS disclosed in the course of the Bureau investigation that News Corp. paid $24,000 at the time THC issued the common shares. (The additional contribution, totalling approximately $425 million, was treated by THC as additional paid-in capital.) Although that figure would have been a technically accurate response, it arguably would have been less informative than the answer actually provided by FTS and therefore its absence does not support finding an intent to deceive.

[64] We also find inconsistent with an intent to withhold information FTS's submission of ownership reports for all of the companies in the FTS ownership chain up to and including News Corp., none of which were required under our rules.

provided his client with a "clear warning that Fox had not been entirely candid in the past." Rep. Comments at 101. The second document is a 1989 internal company memorandum concerning a potential corporate restructuring of FTS in which Herwitz, an officer of FTS, states that restructuring may be the "straw that broke the camel's back" on compliance with Section 310(b). Metro NAACP urges us to find that this memorandum proves that FTS knew and deliberately withheld information concerning its alien ownership. The third document, a 1990 legal memorandum written on the letterhead of Gardner's law firm, expresses the opinion that "the relative equity interests held by aliens must be considered as capital stock," and urges the recipient to abandon plans for a corporate restructuring because "it is paramount to avoid . . . reexamination of Fox TV's ownership structure by the Commission." Metro NAACP asserts that this memorandum can only be read as part of a "conscious scheme to keep the Commission in the dark" about a fact material to granting the renewal applications. Rep. Comments 105.

110. FTS views the documents very differently. It sees the 1988 opinion letter as an unequivocal endorsement of the legality of FTS's ownership structure, a conclusion unaffected by a tangential discussion about the Commission's use of equity ownership to calculate benchmarks for limited partnerships. The 1989 memorandum, according to FTS, does not express any doubts about the viability of FTS's present ownership structure, but expressed concern should that structure be changed. The 1990 memorandum, says FTS, must be considered in the context of an attempt to discourage a proposed corporate restructuring that was the idea of a single employee who subsequently abandoned it and that might have invited legal challenges from FTS's opponents in the battle over the Commission's financial interest and syndication rules. We will consider each document in turn.

2. The 1988 Opinion Letter

111. The first document is a March 30, 1988, opinion letter from Gardner, FTS's outside communications counsel, to Herwitz, who at that time was FTS's Vice President for Corporate and Legal Affairs. MMB Ex. 1. The letter states that Herwitz had requested an opinion on FTS's compliance with Section 310 in connection with the filing of renewal applications, and states that "[b]ased on the analysis which follows, we believe that Fox is in compliance with the alien ownership provisions contained in Section 310(b)." The letter then sets out that analysis, under the assumption "that the common stock in THC held by Fox, Inc., and ultimately controlled by News Corporation, constitutes in excess of 25 percent of the equity capital of THC." Id. at 2. Because the full analysis is critical to a complete understanding of the letter, we quote it at length:

The focus of a Section 310(b)(4) analysis is on THC as the corporation which controls Fox. The distribution of the voting authority of THC complies with the 25 percent alien ownership limitation of Section 310(b)(4) since stock representing 76 percent of the total vote . . . is owned of record and voted by U.S. citizens.

However, the statute speaks in terms of "capital stock, owned or voted." The Commission has held that, for purposes of Section 310(b), non-voting common stock and limited partnership interests constitute "capital stock." See Reconsideration Order, 1 FCC Rcd at 13-14. In determining whether interests in such "capital stock" exceed the statutory thresholds, the Commission has indicated that it will look to the relative capital contributions represented by such interests. See id. at 14; Declaratory Ruling, 103 F.C.C.2d at 520; Letter from James L. McKinney, Chief, Mass Media Bureau, to American Colonial Broadcasting, dated January 10, 1985. Applying this analysis, since the common stock held by Fox, Inc. represents greater than 25 percent of the equity capital of THC, News Corporation's interest in Fox, held through Fox, Inc., could be construed as exceeding the 25 percent benchmark of Section 310(b)(4).

Even accepting this analysis, we believe that Fox can in good faith certify in its renewal applications that it is in compliance with Section 310(b). The express language of Section 310(b)(4) prohibits ownership interests in excess of the 25 percent threshold only if the Commission makes an explicit finding that such an interest in a corporation controlling a licensee is contrary to the public interest. Thus, an attributable alien interest of greater than 25 percent in a corporation controlling a licensee is not unlawful under Section 310(b)(4) unless the Commission makes an affirmative finding that such ownership is inconsistent with the public interest. The Commission has made no such finding regarding Fox. Indeed, in granting the assignments of the Metromedia stations to Fox, the Commission reviewed and approved Fox's ownership structure. [footnote call] Accordingly, in view of the express language of Section 310(b)(4), the Commission's approval of the assignment of the licenses from Metromedia and Fox's previous disclosures

> to the Commission of its ownership structure, we believe that Fox can in good faith certify that it is in compliance with Section 310(b) in its renewal applications.

The footnote states that:

> The FCC Form 314 application fully disclosed the two classes of voting stock of THC and News Corporation Limited's ultimate control of 100 percent of the common stock representing 24 percent of the vote, although there was no explicit discussion of the relative contributions to capital of the holders of the voting preferred and common stock.

112. This letter demonstrates an awareness by Gardner of the Commission's increasing focus on the relevance of equity capital contributions to the calculation of Section 310(b) benchmarks. Gardner appears to recognize that the Commission may apply an equity contribution test rather than a "count the shares" methodology, even to corporate licensees. We therefore agree with Metro NAACP to the extent it asserts that FTS's counsel had an awareness that corporate equity capital, rather than just shares of stock, could be an object of scrutiny under the alien ownership law.

113. Indeed, between the time FTS filed its 1986 Ownership Report and the time of Gardner's letter, the Commission had issued its Reconsideration Order, to which the 1988 opinion letter cites. There, we declined to issue a blanket exemption for all non-voting limited partnership interests from consideration under Section 310(b)(4), stating that "the adoption of the equity benchmarks in Section 310(b) reflects congressional concern over substantial alien ownership of Commission licensees . . . even where the alien's ownership interest is non-influential in nature." 1 FCC Rcd at 13. We also declined to exempt non-voting preferred stock from our determination of benchmark compliance by corporations, on the ground that such stock is "capital stock" under the plain meaning of Section 310(b). Finally, we declined to reconsider our earlier decision to calculate benchmark compliance of limited partnerships based upon equity contribution rather than partnership share. On the latter point, we expressed our concern that in certain situations, "partnership share could seriously understate the actual equity interest of the aliens." Id. at 14.

114. Like the initial Wilner & Scheiner opinion, the Reconsideration Order might have been seen as part of a trend in our reported decisions toward considering equity generally in connection with Section 310. Indeed, the 1988 opinion letter cited it for that proposition. But, like the initial opinion, the Reconsideration Order does not clearly indicate that for corporations with voting stock only, Section 310 benchmark compliance would be determined based on equity contributions. A reasonable applicant or licensee

in 1988 – particularly one whose capital had been structured to comply with an earlier understanding of the law – would not necessarily have interpreted the Reconsideration Order to apply to corporate voting stock. This is especially true given that in other broadcast contexts, we attribute interests in partnerships and corporations differently. We therefore disagree with Metro NAACP's argument that the Reconsideration Order plainly put licensees on notice that the Commission would consider corporate equity in calculating 310(b) compliance.

115. Our Order in PrimeMedia Broadcasting Inc., 3 FCC Rcd 4293 (1988), released six weeks after the opinion letter, is also relevant to this issue. PrimeMedia addressed the question whether an applicant for a broadcast license was in compliance with Section 310(b) where more than 50 percent of the stock was held by an irrevocable trust whose beneficiary was an alien, but whose trustees, who would vote the stock, were United States citizens. We decided, relying in part on Wilner & Scheiner, that the alien's equitable stake in the applicant by virtue of his position as beneficiary of the trust exceeded the level allowable under Section 310. To be sure, the Order discusses "equitable ownership interests" and concludes that Congress intended to include such interests in the statutory benchmark. But there is no indication in the opinion that we would in the future calculate benchmark ownership levels in corporations in any way other than counting the shares held by foreigners. Thus, a reasonable licensee would not necessarily have interpreted PrimeMedia as having articulated that the Commission would determine benchmark compliance with reference to corporate equity capital contributions.

116. We do not find that the 1988 opinion letter demonstrates, as Metro NAACP contends, that FTS knew that its alien ownership violated Section 310 and hid that knowledge from the Commission by continuing to certify its compliance with the law. Instead, from the client's perspective, the letter broadly affirms the propriety of certifying compliance with Section 310, although it warns that if an analysis that had previously been applied only to non-voting stock and limited partnerships were applied to FTS, News Corp.'s interest "could be construed" to exceed the benchmark. That warning of potential risk is countered, however, by a definitive and strongly expressed statement that FTS could make its certification in good faith. We agree with FTS that it was entitled to rely in good faith on its communications attorney's ultimate conclusion despite the other warning language, and find that FTS was not faced with such facts to suggest that reliance would be inappropriate.

117. We note that the opinion ultimately relies on the theory that alien ownership interests exceeding the 25 percent benchmark of Section 310(b)(4) are permissible unless the Commission finds otherwise and that, because it made so such finding with respect to the Metromedia transaction, the Commission had approved of FTS's alien ownership. Yet, as we discuss above, we reject the presumption that alien ownership greater than 25

percent is acceptable in the absence of an explicit public interest finding to the contrary. More significantly, however, the Metromedia opinion contains no discussion at all suggesting that the Commission considered whether the public interest would be served if News Corp.'s interest in THC were deemed in excess of the 25 percent benchmark. See 102 F.C.C.2d at 1336-1337, 1352. Moreover, the above-quoted footnote to Gardner's letter stated that the 1985 application did not explicitly discuss relative equity contributions. Gardner's theory therefore suggests that the Commission had approved the largest-ever alien broadcast investment without a word to that effect and on the basis of incomplete information.

118. Despite this somewhat remarkable proposition, we conclude that the opinion letter, read as a whole, need not have caused FTS to second guess whether it could "in good faith" certify that it was in compliance with Section 310, especially since FTS's ownership structure had not changed between its creation and Gardner's letter. The record shows that, in fact, the FTS employees responsible for certifying compliance with Section 310 relied on their counsel's ultimate conclusion.[65]

119. Although there are situations where "advice of counsel cannot excuse a clear breach of duty by a licensee," RKO General, 670 F.2d at 231 (citation omitted); United Broadcasting, 94 F.C.C.2d 938 (1983); Asheboro Broadcasting Co., 20 F.C.C.2d 1 (1969), this case is not one of them. First, we do not find that the duty of a corporate licensee to report alien equity capital contributions was sufficiently clear to FTS during this time period to charge FTS with a lack of candor. The foreign ownership question here involved a technical issue in a complex area of the law, making reliance on specialized counsel particularly appropriate. Moreover, there is no indication in the record that FTS did not rely on Gardner's advice in good faith. Herwitz testified that the bottom line of the 1988 opinion letter was that he could certify compliance. Herwitz Dep. at 51. He also testified that he was at the Commission when Wilner & Scheiner was decided, which reinforced his belief that that decision did not apply to corporations. Id. at 53-54, 58-59.[66] As the Review Board noted in Abacus Broadcasting, 8 FCC Rcd at 5113, "the Commission has been . . . reluctant to impute a . . . lack of candor to an applicant where the record shows good faith reliance on counsel." Accord WEBR, Inc. v. FCC, 420 F.2d 158, 168 (D.C. Cir. 1969). This is not a situation like that in WADECO, 628 F.2d at 127, or Pontchartrain Broadcasting Co., 7 FCC Rcd 3264 (Rev. Bd. 1992), recon. denied, 8 FCC Rcd 2256 (1993), where the applicants were aware of

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[65] See Herwitz Dep. at 51-59; Pauker Dep. at 23-24.

[66] See also Herwitz Dep. at 54, 56.

and acquiesced in counsel's plainly misleading submissions to the FCC.[67] In the circumstances presented here, we cannot conclude that there is a substantial issue of fact concerning whether FTS's certifications of compliance following the 1988 opinion letter were the product of deceptive intent.[68]

3. The 1989 "Herwitz Memorandum"

120. The second document that Metro NAACP alleges demonstrates FTS's knowledge that it was violating Section 310 is an October 2, 1989, memorandum from Herwitz to David Handelman, then Vice President and Secretary of THC and General Counsel of Fox, Inc. MMB Ex. 35. See Handelman Dep. at 7, 9. We quote in its entirety the relevant paragraph, which constitutes almost the entire memorandum:

> In order for us to examine the possibility of eliminating Twentieth Holdings Corporation or Fox Television Stations Inc. from the licensee's corporate structure, we need accurate and complete information about all the subsidiaries from the ultimate parent on down. The issue will come down to the stock we place in the Communications Acts' [sic] distinction between voting stock and capital stock. While, presumably, we could increase the protection of a licensee by ensuring that preferred shares are only entitled to 19 percent voting

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[67] In Stereo Broadcasters, Inc., 87 F.C.C.2d 87, 103 (1981), we held that "erroneous advice of counsel, as a matter of policy, is no defense to a violation of the Commission's reporting requirements because of the clear danger to the regulatory process," but there we also found that "the average person could readily appreciate" the incorrectness of the advice and the evidence showed that the licensee himself believed that his actions were illegal. Compare Lorain Community Broadcasting Corp., 18 F.C.C.2d 686, 688 (1969), aff'd sub nom. Allied Broadcasting, Inc. v. FCC, 435 F.2d 68 (D.C. Cir. 1970) (appearing to reject reliance on counsel defense, but finding that licensee's genuine reliance negated intent to deceive).

[68] We are also concerned that we not unduly discourage licensees from turning to attorneys for advice and from relying on that advice in good faith. We encourage licensees to consult experienced counsel and believe that licensees are generally entitled to rely on their advice. We do not think it appropriate to find a lack of candor where a licensee has not second guessed its own attorneys, as long as the advice rendered appears reasonable and is relied on in good faith. We do not wish to create an environment in which licensees are discouraged from seeking and following the advice of legal counsel.

> rights (rather than the present 24 percent voting),[69] that shift may be the "straw that broke the camel's back" if it heightens concerns about the influence of limited-voting capital stock.

Metro NAACP contends that the author's use of phrases such as "straw that broke the camel's back" and "heightens concerns" indicates that Herwitz already had substantial doubts about the legitimacy of FTS's ownership structure, especially in light of the 1988 opinion letter from Gardner suggesting that THC's equity structure could be vulnerable to challenge. Metro NAACP asserts further that the discussion of "capital stock" versus "voting stock" indicates that FTS had realized that there was a distinction between them. Yet, Metro NAACP argues, FTS did not bring those doubts to the attention of the Commission, a failure, it claims, amounts to an intentional lack of candor.

121. FTS interprets the Herwitz memorandum quite differently. It rejects the theory that the memorandum expressed any present doubts about FTS's structure and posits instead that the memorandum concerns only the future effects of a change in the corporate structure that would, by eliminating the holding company, have made THC subject to the 20 percent alien ownership threshold of Section 310(b)(3), which the Commission has no discretion to allow a licensee to exceed. Accordingly, FTS argues, the memorandum does not question FTS's current compliance with Section 310, but only cautions against making changes in the corporate structure. Herwitz did not recall anything about the memorandum or its context. Herwitz Dep. at 63-66.

122. The Herwitz memorandum must be interpreted in light of the opinion letter that Herwitz received the prior year containing counsel's advice that FTS could certify that it was in compliance with Section 310. Although Herwitz himself could not remember anything about the memorandum or its context, the document echoes Gardner's earlier advice when it discusses the difference between capital stock and voting stock and expresses concerns about "the influence of limited-voting capital stock." Thus, while to some degree the memorandum expresses some anxiety about the existing FTS/THC ownership structure, that concern is unremarkable given the 1988 opinion letter's indication that the Commission could consider corporate equity to be "capital stock" within the meaning of Section 310. Yet that uneasiness is precisely the matter that Gardner had addressed the year before when he assured his client that it could certify its compliance with Section 310. We do not believe that FTS's failure to bring to our attention a concern that counsel had raised and laid to rest one year earlier evidences an intent to deceive. We find for the reasons expressed above that at the time FTS was entitled to continue to rely on its counsel's advice. Moreover, nothing in the 1989

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[69] This appears to be an error. It is the common stock, not the preferred stock, that currently has 24 percent voting rights in THC.

memorandum indicates either an intention to withhold information from the Commission or suggests that information had been withheld in the past. We thus conclude that the Herwitz memorandum does not raise a substantial and material question as to whether FTS deliberately withheld information about its compliance with Section 310(b).

123. Furthermore, the memorandum was written in the context of Fox, Inc.'s desire to streamline its corporate structure, principally for tax reasons, Handelman Dep. at 18-19, and is addressed to "the possibility of eliminating" either the holding company (THC) or the licensee (FTS) from the corporate structure. We therefore agree with FTS that the language referring to "heightened concern" about foreign influence primarily expresses reservations about the possibility of concern *if* the ownership structure were to change. There is no prohibition on planning future corporate strategy, such as corporate reorganizations, so as to avoid creating problems that have been identified by counsel. That kind of future planning is what the Herwitz memorandum principally addresses.

4. The 1990 "Brennan Memorandum"

124. The third document is a June 5, 1990, memorandum that appears to be from Gardner and his partner, James Denvir, to Daniel Brennan, then Vice President for taxation of News America Publishing, Inc. ("NAPI"), a domestic subsidiary of News Corp. and the corporate parent of Fox, Inc., THC, and FTS.[70] MMB Ex. 3. A copy was also sent to Larry Kessler, then Vice President and General Counsel of NAPI.[71] Like the Herwitz memorandum, the Brennan memorandum also relates to proposals to restructure the ownership of FTS (although there is no evidence of any connection between the two), and the author expresses some concern about alien equity contributions to FTS. We again quote from the memorandum at length:

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[70] Brennan Dep. at 4. Although the memorandum indicates that it is from Gardner and Denvir, and the handwritten initials "MRG" appear next to Gardner's name, both men testified that they did not write the memorandum and Gardner testified that he did not agree with some of the conclusions drawn in it. See Gardner Dep. at 42-43, 47-53; Denvir Dep. at 22-23, 27. As discussed below, however, Gardner also testified that he was familiar with the issues addressed in the memorandum, and it is on the letterhead of Gardner and Denvir's law firm. Regardless of its actual author, the memorandum was in fact sent and received, at least by Kessler. See Kessler Dep. at 7. Moreover, Brennan remembers discussing the contents of the memorandum with Gardner. Brennan Dep. at 24, 26-27.

[71] Kessler Dep. at 4-5, 7; MMB Ex. 3 at 3.

This memorandum confirms the conclusions reached during discussions last week concerning News America's options for restructuring the ownership of [FTS].

* * *

As we have discussed, Fox TV's current ownership structure is arguably vulnerable to challenge under Section 310 of the Communications Act, which prohibits greater than 25 percent of the "capital stock" of a corporation controlling an FCC licensee to be held by aliens (or a corporation controlled by aliens), if the FCC determines that such ownership would be inconsistent with the public interest.

* * *

As we have previously advised you, clarifications of the alien ownership restrictions adopted by the FCC following [FTS's] acquisition of the Metromedia stations explicitly hold that in evaluating compliance with the Communications Act restrictions on alien ownership, the relative "equity" interests held by aliens must be considered as "capital stock." [citing Wilner & Scheiner and American Colonial].

The Company has previously informed us that Fox, Inc.'s ownership of THC common stock represents in excess of 25 percent of the equity of THC and, therefore (because control of Fox, Inc. is ultimately vested in a foreign corporation) may exceed Section 310's restriction on alien ownership of the "capital stock" of a corporation controlling an FCC licensee. As we have previously advised the Company, since Rupert Murdoch, a U.S. citizen, has ultimate control of Fox, Inc., the FCC could still approve alien ownership in THC in excess of 25 percent since the foreign entities in Fox, Inc.'s corporate ownership chain are ultimately controlled by a U.S. citizen. Because of the uncertainty, however, of the outcome of a challenge to [FTS's] ownership structure, we have been in agreement that it is paramount to avoid any corporate restructuring which would potentially invite reexamination of [FTS's] ownership structure by the Commission . . . .

125. Metro NAACP urges us to draw two principal conclusions from this document. First, it asks us to read the document as a frank realization on the part of FTS and its counsel that the alien ownership benchmarks are calculated by examining equity contributions. Second, it asks us to find that the memorandum's references to "paramount" objectives of avoiding Commission "reexamination" of the FTS corporate structure memorializes a "scheme to keep the Commission in the dark" about the true nature of FTS's alien ownership. Reply Comments at 105.

126. FTS, on the other hand, would have us view the document differently. It contends that the memorandum was addressed to a News Corp. tax attorney who had, of his own initiative, devised a plan to consolidate THC into its parent company in order to achieve tax savings. Thus, according to FTS, the memorandum amounts to a "strongly worded vehicle," intended to discourage the employee from modifying a corporate structure that had been designed specifically to comply with Section 310(b). FTS asserts that any "vulnerab[ility] to challenge" referred to in the memorandum was due entirely to a heated dispute over financial interest and syndication rules that had left Fox with a host of enemies. In that context, FTS claims, the memorandum cannot properly be read to reflect any concern about the existing ownership structure and does not raise any question about failure to disclose material facts to the Commission.

127. We do not agree with FTS that the Brennan memorandum does not reflect concern about FTS's ownership structure under Section 310(b)(4). In contrast to the 1988 opinion letter, the 1990 memorandum does not provide any assurance that FTS was in compliance with the Communications Act, although it indicates that the Commission could still approve alien ownership exceeding 25 percent. Indeed, the memorandum quite plainly indicates that there is such uncertainty concerning the existing ownership structure that FTS should avoid any action that would bring the matter to the Commission's attention. In that important respect, the Brennan memorandum is different from the 1988 opinion letter or the 1989 Herwitz memorandum.

128. We must decide whether the advice and information in the memorandum should have alerted the licensee of its duty to inform the Commission of material information about FTS's ownership structure. Had the memorandum been sent to officers and directors of the licensee, or employees of the licensee responsible for compliance with FCC requirements, those officials should at a minimum have made further inquiry regarding the nature of any legal uncertainties about the ownership structure. The record is clear, however, that the memorandum was sent only to Brennan himself and Kessler, and not to any employee, officer, or director of FTS or THC. Although neither Brennan nor Kessler took any action, we find that because of the nature of their responsibilities their failure to make the views expressed in the memorandum known to others more directly responsible for compliance in communications matters was

not done with any intent to deceive. Thus, the memorandum does not raise a substantial question about FTS's candor.

129. Brennan was an employee in the tax department of NAPI, with no responsibility for or connection to FCC matters. He testified that he viewed the memo's discussion of FCC matters as "arcane stuff and FCC rules," and that he would not have read anything cited pertaining to the Communications Act or FCC cases. Brennan Dep. at 21, 25-26. Indeed, the memorandum made so little impact that it did not stop Brennan from continuing with his consolidation plan. Id. at 28.

130. Kessler was General Counsel of NAPI, and also had no responsibility for or knowledge of FCC affairs. Kessler stated that he took no action after receiving the memorandum "because I was satisfied that there was a theory under which everything was all right." Kessler Dep. at 11-12. He believed that the memorandum was "nothing to worry about or nothing to raise a red flag on because it's a non-problem based on Mickey Gardner's conclusion about Mr. Murdoch's citizenship prevailing if there was ever a question." Id. at 11.

131. In short, only two people saw the Brennan memorandum at the time, both of whom worked for a company three-times removed from FTS up the holding company structure, and neither of whom had anything to do with FCC matters or believed the memorandum raised questions of particular significance. Neither person still works in the News Corp. organization, and both testified that they did not discuss the memorandum with any other person in the company or even with one another. Every other witness, including Herwitz and Pauker, who were responsible for certifying compliance with Section 310, testified that he or she had never seen the document until shown it in the course of the Bureau's investigation.[72] Many of those persons, however, had seen and relied on the 1988 opinion letter.

132. In the circumstances, we do not think that FTS, the licensee, should be charged with any failure to act on the part of Brennan and Kessler. Ideally, Brennan and Kessler would have brought the memorandum to the attention of appropriate personnel at FTS, but both men's lack of familiarity with the concepts of communications law and their lack of responsibility for compliance therewith largely explains their failure to grasp the significance of the memorandum or to inquire further about its conclusions. In sum, we cannot say that the Brennan memorandum demonstrates an intent on the part of FTS itself -- the licensee -- to withhold relevant information from the Commission. See

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[72] Herwitz Dep at 70; Pauker Dep. at 68-69; Murdoch Dep. at 60; Siskind Dep. at 80; Diller Dep. at 11; Handelman Dep. at 24; Carey Dep. at 39; Sarazen Dep. at 35; DeVoe Dep. at 20.

Tempo Satellite, Inc., 7 FCC Rcd 2728 (1992) (declining to attribute to company behavior of employee who had been involved in serious antitrust violations involving cable television franchising where information concerning the employee's behavior was not known to company officials and managers).

133. We are also satisfied that the Brennan memorandum does not reflect a strategy by FTS to prevent the Commission from discovering facts about its alien ownership. Gardner testified that he believes the memorandum's legal conclusions were "sloppy" and reflected too negative a tone on the question of alien ownership, but noted that, because of Fox's many enemies, he wanted Brennan and his tax plans to "just to go away," and observed that "when you are dealing with outside influences in a big corporation . . . you have to push back very hard." Gardner Dep. at 43-44, 48-49, 52. Thus, the strong wording of the memorandum is reasonably explained by the need to achieve its counsel's immediate goal of not "tinkering" with the ownership structure, id. at 43-44, and is not evidence of a more general intent to hide things from the Commission.

134. The foregoing analysis shows that, taken separately, none of the documents discussed above raises a substantial question of fact concerning whether FTS lacked candor. We further find that, taken together, the evidence does not demonstrate an overall pattern of lack of candor. We reach that determination because the record does not support a finding that there are any links between the events of 1985, those of 1986, and those after 1988. In the absence of such connections, the evidence taken together does not create a picture of FTS's candor that is materially different from the sum of its parts. Thus, having found insufficient evidence that FTS intentionally misrepresented or withheld material facts in any of the individual aspects described above, we also find that FTS has not lacked candor as an overall matter during the last ten years.

G. FTS's Responses to the Bureau's Letters of Inquiry

135. The circumstances surrounding the Mass Media Bureau's Letters of Inquiry and FTS's response are described above at ¶¶19-22. Pertinent here is the first letter's request that FTS "please state the percentage of equity ownership that [News Corp.] or other aliens have [*sic*] in FTS." In response to that request, FTS did not provide the percentage of equity ownership, but answered instead that because voting control, *de facto* control and "capital stock structure" were consistent with the statutory goal of preventing undue alien influence, "the precise dollar value of News Corp.'s equity contribution at any given time would appear immaterial to the Commission's section 310(b) analysis." MMB Ex. 7 at 2.

136. Metro NAACP contends that FTS's failure to state the percentage of alien equity in the face of the Bureau's direct inquiry is itself a lack of candor. FTS asserts in

response that it did not understand the Bureau to be asking for a specific percentage of equity, but that its answer to the first Letter of Inquiry was nonetheless complete because it stated that "substantially all the funding had been provided by News Corp., that News Corp. was entitled to all the profits and losses, and that News Corp. owned the predominant equity interest." FTS Comments at 73-74.

137. We do not find that FTS's March 21 response to the Bureau's inquiry amounts to a lack of candor. In the letter, FTS's attorneys decline to provide the information requested based on a theory under which the percentage of equity contribution was not relevant to the foreign ownership question. As noted, that theory is incorrect, but it is not facially implausible. Thus, we do not find that the letter evidences an intent to withhold information known to be relevant. Moreover, we note that the letter indicates that "News Corp. entities were the source of most of THC's equity funding," MMB Ex. 7 at 2, and that "the amount of News Corp.'s equity funding contribution has always been in excess of 25 percent of THC's aggregate equity funding," id. at 10. Thus, despite the argumentative tone of the letter, to some degree it provided information responsive to the Bureau's question.

138. Nevertheless, we are concerned about FTS's first response to the Bureau's inquiry. FTS did not assert that the information requested was privileged or that it would be unduly burdensome to provide. Neither did FTS argue at the time that the Bureau's request to "state the percentage of equity ownership that [News Corp.] or other aliens have in FTS" was unclear, or seek clarification of the request. Evidence that FTS did in fact understand the question as it was intended is included within its own response: FTS argued that "the Commission's inquiry should necessarily focus, not on the value of contributed capital, but rather on [other factors]." This response reveals that FTS understood the inquiry to address "contributed capital." We also note that the same information was requested in the Second Letter of Inquiry and FTS gave a clear answer: 99+ percent.

139. We recognize that where a licensee has a principled basis for resisting requests for information from the Commission it must be free to assert such arguments. This is not such a case, however. Even if FTS believed the information was immaterial under its own interpretation of Section 310(b), that is not a sufficient basis for failing to answer the question. In the context of this case, where FTS itself had asked the Commission to resolve this issue,[73] and in light of our licensees' duty to respond to Commission inquiries, such a response is not adequate. 47 C.F.R. §73.3514(b) ("The FCC may require an applicant to submit such . . . written statements of fact as *in its judgment* may be necessary.") (emphasis added); 47 C.F.R. §73.1015 ("No applicant

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[73] Letter from William S. Reyner Jr. to William Caton (Feb. 23, 1994).

. . . shall in any response to Commission correspondence or inquiry . . . make any . . . willful material omission bearing on any matter within the jurisdiction of the Commission."); 47 C.F.R. § 1.17 (same); see 47 U.S.C. § 308(b) (Commission may "at any time . . . require from an applicant or licensee further written statements of fact.")

140. We are particularly concerned because FTS asserts that it was responsive. After finally disclosing in its May 23 letter that News Corp. had provided over 99 percent of the equity capital of THC, FTS asserted that "it has always been recognized, even absent a specific percentage, that the common stock of THC represents virtually all of the corporation's aggregate economic/equity interest." MMB Ex. 9 at 3. FTS therefore resisted providing specific information to the Commission that it contends had for all practical purposes already been disclosed. Such conduct is unacceptable. In fact, in this case, the nature of the FTS response in large measure prompted our further investigation.

141. While the Commission expects greater cooperation than FTS exhibited here, we do not find that it raises a substantial question as to the deceptive intent necessary to a finding of lack of candor. FTS failed to make the particular disclosure requested, but did disclose the most salient information for the benchmark analysis at issue – that News Corp. had contributed over 25 percent of the equity capital to THC. While evasive responses make an applicant more susceptible to a charge of lack of candor and fall short of what we expect from applicants and licensees, in the circumstances of this case we do not find that the issue warrants further investigation as possibly constituting a lack of candor.

H. Murdoch's Stock Ownership

142. The evidence indicates that FTS discovered in late 1986 that, through an "administrative oversight," Murdoch may not have perfected his voting control over a trust that in turn controlled certain News Corp. stock. FTS had earlier told the Commission that Murdoch would have control of the trust, and specifically of the 3 percent of News Corp.'s stock owned by the trust. Metro NAACP claims, based on a March 1987 letter from FTS outside counsel Howard Squadron to Gardner, Document A-52, that the same administrative oversight that may have affected Murdoch's control over the 3 percent of News Corp. stock may also have affected Murdoch's power to control an additional 46 percent of News Corp.'s stock, thus undermining Murdoch's claim that he controlled News Corp. Yet, asserts Metro NAACP, FTS chose not to report that potential problem to the Commission either at a meeting with the Bureau staff in early 1987 or afterwards, which amounts to "a conscious decision . . . not to disclose developments relating to the control of News Corp."

143. FTS responds that Document A-52 shows that at the time FTS's attorneys brought this incident to the Commission's attention, they had focused solely on the effect of the administrative oversight on Murdoch's vote of 3 percent of News Corp. and had not realized that there could be other effects. When FTS counsel brought the oversight to the Commission's attention, they therefore raised only the 3 percent vote matter. FTS appears to argue that even though FTS counsel may not have informed the staff of the other effects of the administrative oversight, FTS could not have had an intent to conceal that information because it had not yet been discovered. FTS also points to MMB Ex. 42, which recounts the meeting between FTS attorneys and the Bureau staff, after which the staff informed Gardner that the oversight was "immaterial."

144. It is not at all clear to us whether the administrative oversight actually affected Murdoch's control of 46 percent of News Corp.'s stock. In any event, we do not find that the evidence raises a substantial and material question concerning FTS's intent to withhold information. The evidence is undisputed that FTS of its own initiative brought this matter to the Commission's attention in January 1987, an act that is inconsistent with an intent at that time to withhold information. With respect to the issue of Murdoch's control of the 46 percent of News Corp., Document A-52 indicates that at the time of their meeting with the staff, FTS's lawyers had not "concentrated" on that issue or even discussed it among themselves. It therefore appears that even though FTS did not bring a potentially serious issue to the staff's attention, FTS had not actually focused on that issue at the time and therefore did not intentionally fail to reveal the matter. Moreover, as Document A-52 indicates, the Commission's reporting rules would not have required disclosure of changes in the precise ownership of News Corp. stock or of trusts that controlled News Corp. stock, since reporting "up the chain" of ownership is unnecessary where, as with THC, there was a single majority shareholder. It thus appears that FTS would not have had a duty to bring to the staff's attention changes in trust ownership. In the circumstances, we do not find a substantial issue of fact warranting a hearing.

I. Other Character-Related Allegations

145. Also before us is Metro NAACP's "Further Supplement to Petition to Deny: Fox' [*sic*] Misconduct in Connection with the Gingrich Book Deal." In addition to supplementing the Petition to Deny, that pleading purports as well to be a petition for review of the Bureau's decision not to expand the scope of its inquiry to include matters concerning a book contract that has been entered into between the Speaker of the House

of Representatives and HarperCollins, another News Corp. subsidiary. That contract received a great deal of media attention at the time it was announced.[74]

146. Metro NAACP's supplement to the Petition to Deny is based on two assertions. First, Metro NAACP claims that the circumstances of the book deal, as reported in the newspapers, raise an "appearance of impropriety" on the part of HarperCollins because the contract was entered into with an influential congressman while the Commission was considering FTS's application for renewal of its license for WNYW-TV. Further Supplement to Petition to Deny at 5. Even assuming that the behavior of HarperCollins would be attributable to FTS,[75] our consideration of "non-FCC" misconduct – *i.e.*, misconduct that may violate the law but does not specifically contravene the Communications Act or a specific Commission rule or policy[76] – is limited to felonies, fraudulent representations, and mass media-related violations of antitrust laws or other laws regulating competition.[77] Character Qualifications, 7 FCC Rcd 6564, 6566 n.31 (1992). HarperCollins's allegedly improper actions would at most constitute such non-FCC conduct. Moreover, non-FCC conduct will not be considered in the absence of "an ultimate adjudication by an appropriate trier of fact." Character

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[74] Although FTS has moved to strike Metro NAACP's pleading on the ground that it must be deemed an application for review of the Bureau's decision not to expand the scope of its investigation and that it fails to satisfy 47 C.F.R. § 1.115(b)(2), we will treat the pleading on the merits as both a supplement to the Petition to Deny and as an application for review. A reasonable reading of Metro NAACP's argument is that the Bureau's refusal to expand its inquiry was arbitrary and capricious in violation of the APA.

[75] We will consider non-FCC misconduct involving related officers and directors where "the licensee principal in question was in control of the other entity or was adjudicated to be involved in the other entity's misconduct." Policy Regarding Character Qualifications in Broadcast Licensing, 7 FCC Rcd 6564, 6567 (1992). We will consider non-FCC misconduct of related companies where (1) "there is a close ongoing relationship" between the two companies at issue; (2) they have common principals; and (3) those principals are "actually involved in the operations of the broadcast subsidiary." Id. Metro NAACP has not alleged facts sufficient to make those determinations.

[76] Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d. 1179, 1183 n.11 (1986).

[77] Although Metro NAACP alleges that HarperCollins's misconduct is related to a Commission proceeding, the asserted misconduct did not take place before the Commission and would not have affected the Mass Media Bureau's inquiry into FTS's candor in any event.

Qualifications, 102 F.C.C.2d at 1205. Metro NAACP has neither alleged nor shown that any of those conditions is met in this case.[78] Metro NAACP has in fact done nothing more than assert an "appearance of impropriety" rather than actual misconduct.

147. Second, Metro NAACP claims that FTS misled the Commission about its intent to seek changes in the alien ownership provisions of the Communications Act. The only relevant representation to the Commission that Metro NAACP identifies is FTS's January 9, 1995, letter in opposition to Metro NAACP's request to enlarge the scope of the inquiry, which states in part that FTS "does not seek a change in [Section 310(b)(4)]." The evidence (again gleaned mainly from newspaper accounts) on which Metro NAACP appears to rely for its assertion that the letter was misleading is the allegedly delayed disclosure that Preston Padden, President for Network Distribution of Fox Broadcasting Company (an FTS affiliate), accompanied Murdoch to a meeting with Speaker Gingrich. Metro NAACP does not explain how Padden's presence at a meeting demonstrates that FTS misled the Commission about its intent to seek changes in the law. The speculation that the presence of a lobbyist necessarily means that FTS was attempting to convince Congress to alter the law is insufficient to raise a substantial and material question of fact.

148. For the foregoing reasons, we also affirm the Bureau's decision not to expand the scope of its inquiry or to refer the matter to the Department of Justice. Metro NAACP has shown no ground for either action. In light of our disposition of the matter, we deem moot FTS's motion to strike Metro NAACP's pleading on procedural grounds.

VII. ALLEGED ALIEN CONTROL

149. Section 310(b)(4) gives the Commission discretion to prohibit the grant of a broadcast license to "any corporation directly or indirectly controlled by any other corporation . . . organized under the laws of a foreign country." Metro NAACP contends that News Corp., a company organized under the laws of Australia, controls FTS. FTS contends that it is in compliance with Section 310(b)(4) because Murdoch exercises *de jure* control of THC and *de facto* control of News Corp. We find that Metro NAACP has set forth a *prima facie* case and therefore we proceed to examine the evidence before us to see if a substantial and material issue is presented on the issue of control of FTS.

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[78] Moreover, Metro NAACP's allegations are based almost entirely on hearsay newspaper reports, which in themselves are of doubtful admissibility. See Metropolitan Council of Metro NAACP Branches v. FCC, 46 F.3d at 1165.

150. As used in the Communications Act, "control" means "every form of control, actual or legal, direct or indirect, negative or affirmative." WWIZ, Inc., 36 F.C.C. 561, 579 (1954), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1954), cert. denied, 383 U.S. 967 (1956). We thus examine two types of control: *de jure* (control as a matter of law) and *de facto* (actual control of the licensee). See Metromedia, Inc., 98 F.C.C.2d 300, 306 (1984).

A. De Jure Control

151. *De jure* control typically is determined by whether a shareholder owns more than 50 percent of the voting shares of a corporation. Metromedia, 98 F.C.C.2d at 306. Here, THC has issued 10,000 shares of stock -- 7600 preferred shares and 2400 common shares -- each with one vote. Murdoch owns all of the preferred shares, and News Corp., through several intermediate companies, controls all of the common shares. Because Murdoch controls 76 percent of the vote in THC, he exercises *de jure* control of the company.

152. Metro NAACP argues that Murdoch does not truly have *de jure* control because the preferred stock is redeemable at News Corp.'s discretion: THC's articles of incorporation provide that two-thirds of the common shares may at any time vote to redeem the preferred shares in exchange for nominal payments. It is well established, however, that future redemption rights are not relevant to determining control until the shares are actually redeemed, which they have not been here. Univision, 7 FCC Rcd at 6674.[79] Therefore, until redemption occurs, Murdoch holds *de jure* control. Moreover, THC's certificate of incorporation expressly forbids the redemption of the preferred shares if it would result in foreign ownership levels that violate Section 310(b). We have held that such restrictions on redemption or conversion effectively assure compliance with the Communications Act.[80] See Data Transmission Co., 44 F.C.C.2d 935, 935 (1974); Data Transmission Co., 52 F.C.C.2d 439, 439-40 (1975).

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[79] Accord Attribution of Ownership Interests, 97 F.C.C.2d 997, 1021-22 (1984), reconsidered in part, 58 R.R.2d 604 (1985), further reconsidered, 1 FCC Rcd 802 (1986); Coral Television Corp., 29 F.C.C.2d 266, 278 (Rev. Bd. 1971).

[80] Metro NAACP argues that letters from News Corp.'s independent auditor, Arthur Andersen & Co., to the SEC demonstrate that the redemption feature of the preferred stock proves that News Corp., not Murdoch, controls THC. See Doc. J-11, at 4; Doc. J-15, at 2; Doc. J-16, at 2; Doc. J-22, at 5-6. To the contrary, the Arthur Andersen letters do nothing more than describe the redemption feature and have nothing to do with control of THC.

153. Metro NAACP also contends that the preferred stock should be considered debt rather than equity, and thus that it does not convey *de jure* control. The preferred stock is really debt, the argument goes, because its only return is a small fixed dividend, like an interest payment, and the shares have no claim on the profits of the company or its assets upon liquidation. We find that argument unconvincing. The THC preferred stock includes a feature that definitively differentiates it from debt: the right to a majority vote on corporate affairs. That very distinction has led us not even to consider debt as an ownership interest under our attribution rules. See Transfers of Control of Certain Licensed Non-stock Entities, 4 FCC Rcd 3403, 3409 n.7 (1989); Attribution of Ownership Interests, 97 F.C.C.2d at 1022.[81] It therefore does not matter for purposes of our *de jure* control analysis that the preferred stock has certain other properties that may resemble debt. Cf. Reconsideration Order, 1 FCC Rcd at 13-14 (non-voting preferred shares are "capital stock" for purposes of Section 310(b)). Neither does the stock's redeemability transform Murdoch from a controlling stockholder into a creditor. See In re Culbertson's, 54 F.2d 753, 757 (9th Cir. 1932).

B. De Facto Control

154. Determining *de facto* control is more complex than counting the votes; unlike *de jure* control, it "'transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented.' Case-by-case rulings are therefore required, and we have considered a variety of factors in making our determinations." Univision, 7 FCC Rcd at 6675 (quoting Stereo Broadcasters, Inc., 55 F.C.C.2d 819, 821 (1975)); see Storer Communications, Inc., 101 F.C.C.2d 434, 441 (1985) ("corporate control varies from case to case and cannot be precisely defined"). The determinative question is whether the allegedly controlling party has the power to "dominate the management of corporate affairs." Univision, 7 FCC Rcd at 6675 (quoting Benjamin L. Dubb, 16 F.C.C. 274, 289 (1951)). Here, the totality of the evidence demonstrates that Murdoch holds *de facto* control of THC.

155. In addition to Murdoch's control of 76 percent of THC's vote – which itself strongly indicates *de facto* control – Murdoch is the chairman of THC and one of its directors as well as Chairman and CEO of Fox, Inc., THC's direct parent company. In those capacities, he exercises "direct oversight over the management and day-to-day operation of the Fox-owned television stations," and he "actively participate[s] in all significant decisions relating to the finances, programming, and personnel of the stations." Murdoch Dec. (Mar. 21, 1994) ¶2. The current President of FTS, Chase Carey, who also serves as one of the three directors of THC, has testified that "Rupert

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[81] We note, however, that the level of debt may be considered as a factor in determining the lender's *de facto* control.

Murdoch controls and runs" both of those companies. Carey testified that he reports directly to Murdoch and no one else on all material corporate matters. Carey Dep. at 36-37. See also Murdoch Dep. at 6 ("I'm the man who gives all the instructions" at FTS).

156. We assess that evidence in light of the ultimate meaning of *de facto* control: the ability to dominate the management of corporate affairs. With three quarters of the vote, the chairmanship, and active day-to-day management of the most important activities of the company, Murdoch dominates THC/FTS's affairs. Murdoch's authority amounts to "the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue." WHDH, Inc., 17 F.C.C.2d 856, 863 (1969), aff'd sub nom. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). In this respect, Murdoch's authority at FTS is similar to that of the controlling shareholder in WLOX Broadcasting, Co. v. FCC, 260 F.2d 712, 715 (D.C. Cir. 1958), where the court found that the person who set financial policies and dictated the management of the operations of the licensee exercised *de facto* control even though he held only a small minority of the vote.[82] See Southwest Texas Public Broadcasting Council, 85 F.C.C.2d 713, 716 (1981) (party that made basic policy decisions at station in control, not party that supplied all facilities); Stereo Broadcasters, 87 F.C.C.2d 87-99 (1981) (*de facto* control held by person with apparently small investment in station, but running day-to-day operations). In contrast, in WWIZ, Inc., 36 F.C.C. at 561, the majority shareholder was found to lack control where he had little input into day-to-day management and the evidence showed that another man made all of the important decisions. Id.

157. Metro NAACP nevertheless insists that several factors on which we have relied in past cases to find *de facto* control of a licensee demonstrate that News Corp. is in control. Specifically, Metro NAACP points to News Corp.'s financial contribution to THC, the two companies' common directors and legal counsel, and FTS's use of another News Corp. subsidiary to provide its programming.

158. There is no dispute that News Corp. holds a large financial stake in THC – it contributed $425 million, amounting to 99 percent of THC's equity – and in past cases we have determined that a large financial contribution was an important consideration in our finding *de facto* control by an investor that lacked voting control. E.g. WLOX, 260 F.2d at 715; Capital City Community Interests, Inc., 2 FCC Rcd 1984, 1987 (Rev. Bd. 1987); Pacific Television, Ltd., 2 FCC Rcd 1101, 1101-03 (Rev. Bd. 1987). But we do not typically find that a large financial investment by itself conveys control. Instead, we

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[82] Although that person had also contributed much of the licensee's money, financial contribution was only one factor in the court's decision.

have said that it is only an *indication* of control. As we stated in Univision, "the ultimate question is not the source of funds. It is instead the control of the licensee's finances." 7 FCC Rcd 6676-77. Accord Seven Hills Television Co., 2 FCC Rcd 6867, 6880 (Rev. Bd. 1987) ("financial investment is not the *sine qua non* of legal control, [but] just one of several . . . indicia").[83] Cf. Telemundo, 802 F.2d at 516 ("The usual indicia of control or influence over a corporations affairs . . . may not always reflect operational reality").

159. When we weigh News Corp.'s financial interest against the evidence of Murdoch's *de facto* control, we do not find that there is a substantial question whether News Corp. actually controls FTS. First, the evidence shows that News Corp.'s investment has been specifically restricted to prevent it from exercising control. The funds provided to THC and FTS to acquire the Metromedia stations and for initial operating costs were structured "so that no operational control or authority over the television broadcast licensee will be permitted by non-U.S. citizens or entities at any time or upon default of any intracompany loan." MMB Ex. 14 at 38. That restriction significantly reduces the possibility that News Corp. could control FTS.

160. Indeed, News Corp.'s investment appears to have been passive. Although FTS has held its licenses for nearly a decade under the present ownership structure, there is no evidence before us that News Corp. has ever exercised or even sought to exercise control of FTS. Metro NAACP does not allege any specific incident of actual control by News Corp. See Seven Hills, 2 FCC Rcd at 6878 (no evidence of actual control probative of lack of control). We have held that a showing of *de facto* control must rely on facts and events that have occurred and not on speculation as to what might occur in the future. William S. Paley, 1 FCC Rcd 1025, 1025-26 (1986), aff'd mem. 851 F.2d 1500 (table) (D.C. Cir. 1988). More particularly, in the absence of any "extrinsic evidence that a financier's leverage has manifested itself in the actual operations of a licensee, we can [not] find improper *de facto* control." Seven Hills, 2 FCC Rcd at

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[83] These cases appear to reflect a retreat from the stricter approach taken in Channel 31, *supra*, where we ordered a hearing over control of a station for which an alien investor had furnished the large majority of the necessary funds. On the other hand, in Channel 31 there were indications that the nominal licensee was a "straw man" of the foreign company, which had the option to take control of the station at any time. 45 R.R.2d at 421-422. Those factors are not present here.

6880.[84] We accordingly have no reason to believe that News Corp.'s financial contribution to THC and FTS has overridden Murdoch's actual control.

161. The effect of News Corp.'s investment in THC is mitigated even further by strong evidence that Murdoch wields substantial influence over News Corp. as well. Although we believe that it is not necessary to reach the disputed issue of Murdoch's *de facto* control of News Corp.,[85] Murdoch's authority at News Corp. substantially bolsters his personal control of FTS. The record shows that Murdoch is chairman and CEO of News Corp., in which capacities he "personally directs all significant aspects of News Corp.'s activities." Siskind Dec. at ¶10. Murdoch designates the other directors of the company and has traditionally been designated to vote the vast majority of proxies at the annual shareholders meetings. Through a complex series of trusts, Murdoch also appears to control a substantial portion of News Corp. shares.[86]

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[84] We reject Metro NAACP's assertion that THC and FTS's guarantee of debt issued by News Corp. demonstrates that News Corp. controls THC and FTS. This circumstance is entirely consistent with close intercorporate relationships and does not show News Corp. controls those companies, particularly in light of the evidence that Murdoch controls them.

Metro NAACP claims that a letter from News Corp.'s auditor, Arthur Andersen, to the SEC characterizes THC as a "controlled subsidiary" of News Corp. due to the debt guarantees. As explained more fully below, the letter concerns financial reporting, not the Communications Act, and its conclusions are based only on the notion that "appropriate evaluation of [News Corp.'s] financial position suggests that failure to consolidate THC would be misleading to investors." Doc J-11, at 4. The letter thus has little probative value for our purposes.

[85] We find that it is not necessary to reach that issue because we have determined that News Corp.'s financial contribution to THC does not raise an issue of alien control even in the absence of a finding that Murdoch holds *de facto* control of the parent company. Moreover, the facts surrounding Murdoch's control of those trusts are hotly disputed.

[86] In the Application, FTS asserted that Murdoch would exercise *de facto* control over 49 percent of News Corp.'s voting shares. See MMB Ex. 14 at 15-16. Murdoch was ultimately unsuccessful in perfecting his voting control over one of the trusts that directly held 46 percent of News Corp.'s shares. See Doc. A-52. Nevertheless, it appears that Murdoch has at least a considerable amount of influence over more than 30 percent of News Corp.'s shares by virtue of his corresponding influence over the trusts that own them.

162. In sum, we do not find that News Corp.'s financial stake in THC raises a substantial issue of fact concerning control of FTS. We recognize that News Corp.'s financial interest is large, and perhaps unprecedented in our decisions. The unique circumstances presented here, however, well justify our conclusion.

163. The foregoing analysis also leads us to reject Metro NAACP's argument that because all of THC's directors also hold positions with News Corp., THC is controlled by News Corp. Certainly there are circumstances under which such commonality of personnel would indicate control by the corporate parent. E.g., Trinity Broadcasting of Florida, Inc., 8 FCC Rcd 2475, 2479 (1993), recon. denied, 9 FCC Rcd 2567 (1994). As with financial contribution, however, common directors can *indicate* control, but we have never found it to be dispositive by itself. Here, weighing the substantial evidence of Murdoch's actual control of the licensee against the influence of the common directors, no substantial question of fact results. The evidence shows that "Murdoch personally designates all directors, all members of board committees and all senior executives of News Corp. and its principal operating subsidiaries," which presumably includes THC. Siskind Dec. ¶9. Thus, it is likely that any overlap between the board of News Corp. and that of THC actually demonstrates Murdoch's substantial influence at News Corp. and his *de facto* control over THC and FTS and not News Corp.'s.

164. We likewise dispose of Metro NAACP's claim that the use of the same counsel by both News Corp. and FTS demonstrates News Corp.'s control of FTS. Once again, although in certain circumstances common counsel can be evidence of control, it is by no means a dispositive factor, and the evidence of record greatly outweighs it in this case. As with the companies' common directors, their use of common counsel more likely demonstrates Murdoch's *de facto* control of THC and FTS and his substantial influence at News Corp.[87]

165. Metro NAACP asserts in passing that News Corp. controls FTS because another News Corp. subsidiary provides FTS with most of its programming. Not only

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[87] Metro NAACP's reliance on Poughkeepsie Broadcasting Co., Ltd., 5 FCC Rcd 3374, 3377-78 (Rev. Bd. 1990), rev. denied, 6 FCC Rcd 2497 (1991); and Carta Corp., 5 FCC Rcd 3696, 3697 (Rev. Bd. 1990), modified in other respects, 6 FCC Rcd 6498 (1991), is misplaced. Both cases involved sham partnerships in which counsel was foisted upon an allegedly controlling general partner by allegedly passive limited partners as a means for the limited partners to exercise actual control. That situation bears no resemblance whatsoever to this case, in which there is no evidence that the passive investor has exercised actual control or has dictated the choice of counsel, and there is substantial evidence that the nominally controlling person is actually in control.

has Metro NAACP failed to offer any proof of its assertion, but it has also ignored that fact that the programmer, Fox Broadcasting Company, is, like FTS itself, a subsidiary of THC, which controls FTS and over which Murdoch holds *de jure* control. Moreover, like the other factors discussed above, affiliated source programming does not necessarily indicate control. See Seven Hills, 2 FCC Rcd at 6881-82. The totality of the evidence does not give rise to a substantial question of fact on control.

C. Representations to Other Agencies

166. Metro NAACP has identified various representations made by News Corp. to the Securities and Exchange Commission ("SEC") that it claims lead to two conclusions: first, that News Corp. holds *de facto* control of FTS; and second, that inconsistencies between the disclosures to the SEC and FTS's representations to the FCC prove that FTS intentionally lacked candor about its ownership and control because "News Corp. and Fox assert that Mr. Murdoch's ownership of the preferred stock of THC should be a significant factor to the FCC . . . [but] in their dealings with the SEC they have repeatedly argued that this same stock ownership has no significance." FTS argues in response that Metro NAACP has taken isolated statements out of context from complex reports, and that read properly, the statements do not have the meaning ascribed to them by Metro NAACP and are not inconsistent with representations made to this Commission.[88]

167. The SEC materials on which Metro NAACP relies must indeed be interpreted in their proper context: submissions to an agency that is responsible for protecting investors by ensuring the accuracy of financial reports and whose statutes are intended to effectuate that goal. The SEC's mission materially differs from our own task of ascertaining operational control of broadcast facilities. As such, the SEC may define "control" differently from the way we do, and we accordingly are not "bound [by] . . . definitions of 'control' used in securities law." Storer Communications, Inc., 101 F.C.C.2d at 442. We find that, analyzed in this context, representations made to the SEC by News Corp. do not raise a substantial and material question as to FTS's control or its candor toward the Commission.

168. The document on which Metro NAACP most heavily relies is a February 1993 letter from News Corp.'s auditor, Arthur Andersen & Co., to the SEC, Doc. J-11,

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[88] Since we are satisfied that there are no genuine inconsistencies between News Corp.'s statements to the SEC and FTS's representations to this Commission, we need conduct no further investigation. Compare IDB Communications Group, Inc., 10 FCC Rcd 1110, 1114 (Int'l Bur. 1994)(ordering an investigation of the differences between representations to the Commission and the SEC).

making the following statements: (1) that the interest represented by THC's preferred stock is "immaterial" to THC's total equity; (2) that "redemption of the preferred stock . . . is outside the control of the preferred shareholder;" (3) that THC's guaranties of News Corp. debt "view and treat THC like any other wholly owned subsidiary" of News Corp. and make its financial position "inter-dependent with" News Corp.; (4) that the companies' joint directors "necessarily manage THC for the benefit of" News Corp.; and (5) that the "true controlling financial interest in THC rests with" News Corp.

169. We do not find that Document J-11 raises a substantial factual question that News Corp. controls THC within the meaning of the Communications Act. The letter's stated purpose is to establish that consolidation of THC and News Corp.'s financial reports is necessary, "notwithstanding the lack of technical majority ownership, . . . to present fairly the financial position and results of operations" of News Corp. In other words, in order for News Corp.'s investors to have an accurate picture of the company's performance, it must treat THC – for reporting purposes – as being like "any other wholly owned subsidiary." The notion of control pertinent to the SEC thus clearly concerns financial relationships, which appear to be unlike the operational relationships pertinent to *de facto* control under Section 310(b). The Arthur Andersen letter is not addressed to operational control at all.[89]

170. We also find, as indicated above, that FTS did not lack candor with respect to THC's financial relationship with News Corp. FTS revealed in its initial applications that News Corp. would be entitled to all of the profits and losses of THC and to all of its residual value upon dissolution. It is therefore no surprise that an accountant believes that the two companies' accounts must be consolidated, that the "true" financial interest in THC is held by News Corp., or that THC is managed for the "benefit" of its parent company. Those conclusions follow naturally from the facts and do not demonstrate that News Corp. was telling the SEC facts that were materially different from its revelations to this Commission. The redemption feature of the preferred shares was also disclosed in 1985, and we have discussed above its impact on News Corp.'s control of THC.[90]

171. To be sure, as of February 1993, FTS had not expressly told the Commission that the capital represented by the preferred stock of THC was immaterial to its total equity, as it informed the SEC in Document J-11. But as we have discussed above, FTS did not believe itself to be under an obligation to produce that information at that time, thus negating an intent to withhold that information. We thus do not find that the Arthur Andersen letter raises a substantial question of candor.

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[89] This reasoning disposes of similar arguments made with respect to Documents I-6, J-9, J-10, J-14, J-20,and J-22.

[90] This reasoning disposes of similar arguments raised with respect to Document J-10.

172. Metro NAACP also directs our attention to News Corp.'s 1993 Annual Report to the SEC, Doc. I-7, which explained the basis for consolidating THC with News Corp. for financial reporting purposes as follows:

> The consolidated financial statements include all the entities which The News Corporation Limited controls. For financial reporting purposes, control generally means ownership of a majority voting interest in an entity, but may, in certain instances, result from other considerations, including a company's capacity to dominate decision making in relation to the financial and operating policies of the consolidated entity. Although The News Corporation Limited has less than a majority voting interest in [THC], such entity is included in the consolidated financial statements because The News Corporation Limited is deemed to control such entity for financial reporting purposes.

Doc. I-7 at F-10. Metro NAACP asserts that by this statement, News Corp. is telling the SEC that it dominates the operating policies of THC; *i.e.*, that it controls THC as we have interpreted that term under the Communications Act.

173. The context of the consolidation statement is, like the Arthur Andersen letter discussed above, an explanation of why News Corp. must consolidate THC's finances in order to give a fair picture of its own. As above, "control" must be interpreted accordingly. Moreover, we do not think that the consolidation statement should be read as an acknowledgment that News Corp. dominates the operations of THC; rather, it more likely reflects that News Corp. has the dominant financial interest in THC's operations for SEC reporting purposes. A careful reading of the statement thus shows that, from an accountant's perspective, non-voting control may result from several "considerations," including, but not on the face of the statement limited to, a capacity to dominate decision making. But the remainder of the statement does not apply the domination standard to THC; rather, it leaves open the possibility that some other, unspecified, factor – such as News Corp.'s 99 percent equity contribution and its entitlement to all of THC's profits – leads to "control" as that term is used in financial reports. That interpretation is consistent with the approach that Arthur Andersen took when it asked the SEC for permission to consolidate the companies for the purposes of this very report.[91] In any event, as discussed above, we are fully satisfied that Murdoch

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[91] This reasoning disposes of Metro NAACP's assertions that several other documents, J-18, I-2, and I-7, prove that News Corp. "operates" the FTS television stations. In each case, the a document contains a passing reference, to FTS's being one of News

has *de jure* and *de facto* control of THC and that operational control does not reside in News Corp.

D. Representative of Aliens

174. Lastly, we reject Metro NAACP's suggestion that Murdoch must be considered to be the representative of aliens, in violation of Section 310(b)(4)'s prohibition on the "representative" of an alien's owning or voting more than 25 percent of a licensee's capital stock. Murdoch, the argument goes, is a representative of aliens by virtue of his fiduciary duties to News Corp., as its chairman and a director, and to the various foreign trusts and investment companies that hold News Corp. stock for the benefit of himself and his family, of which he is trustee. FTS relies in response on Murdoch's control of News Corp. and on his sworn declaration that he votes his shares of THC in his personal capacity.

175. We believe that "representative" as used in Section 310(b) means a person who is under the control of an alien, a finding that is not supported by the record. See Seven Hills, 2 FCC Rcd at 6886 (licensee found to be representative of aliens where his own testimony showed he was an agent of foreign interests). Murdoch's uncontradicted declaration states that he votes his THC stock in his own, individual behalf, and not under the direction of News Corp. or any other entity. Murdoch Dec. (Dec. 1, 1993) ¶6. Moreover, any duties that Murdoch owes to News Corp. by virtue of his official corporate roles, or to trusts by virtue of being a trustee, are not sufficient to make him a "representative" of those entities. Fiduciary duties do not make the fiduciary an all-purpose agent of the person or company to which the duty is owed. In any event, in light of the evidence of Murdoch's substantial influence over News Corp., it is not at all clear that Murdoch's corporate roles could possibly make him News Corp.'s representative for the purposes of Section 310. We find that the record does not present a substantial question of fact on this point.

Corp.'s "principal business[es]" or similar language. Each document refers to securities matters and not to FCC matters.

We are likewise unpersuaded by Metro NAACP's reliance on statements made by Barry Diller at the time he resigned as Chief Executive Officer of Fox, Inc. MMB Ex. 39. Diller stated that his "desire to become an actual principal in the business activities with which I was associated" was not possible because "Fox is a wholly owned unit of News Corp." Id. at 1. It appears that Diller was referring to Fox, Inc., as that [illegible] paragraph refers to his position as CEO of Fox, Inc. In any event, Diller's concept of "ownership" does not determine our conclusion concerning control. See Diller Dep. at 16 (indicating that his statement in the press release was "not a legal distinction").

VIII. BENCHMARK COMPLIANCE OR PUBLIC INTEREST WAIVER

176. In this decision, the Commission has comprehensively explained the statutory basis for its conclusion that corporate capital contributions are relevant to determining compliance with Section 310(b)(4)'s ownership benchmark. Applying this conclusion to the facts of this case, we have held that News Corp.'s 99 percent capital contribution to THC exceeds the 25 percent benchmark. As explained in ¶53, a licensee is permitted to exceed the benchmark where the Commission affirmatively finds that the "public interest" would be served as a result.

177. FTS has argued in the course of this proceeding that, in the event the Commission determines that its ownership structure exceeds the benchmark, the Commission should nevertheless approve its renewal application under the public interest standard of Section 310(b)(4). MMB Ex. 9 at 5-8. Among other public interest considerations, FTS maintains the following: it has established a fourth broadcast network; reduced the dominance of the three existing networks, thereby improving the position of local stations relative to the networks and providing competitive choices for advertisers, program suppliers and viewers; promoted the viability of UHF television stations; facilitated local news programming; and made available increased children's programming. Comments of FTS at 76-90. FTS also suggests that the public interest implications of its ownership structure should be analyzed in light of Murdoch's *de jure* and *de facto* control of THC and by FTS's assertion that Murdoch has *de facto* control of News Corp. Metro NAACP, on the other hand, has disputed certain of these statements and whether they justify a public interest finding. Reply Comments of Metro NAACP at 111-119.

178. These factors, including the arguments concerning them raised by FTS and Metro NAACP, will be considered as part of our public interest determination. As explained more fully below, we believe that information regarding the costs or other impacts of achieving benchmark compliance will also be a factor to be considered in the particular circumstances of this case and that the parties should have the opportunity to comment on this issue in light of our decision here. We therefore decline to make a public interest determination at this time and shall allow further submissions on this issue. Accordingly, not later than 45 days from the release of this order FTS may elect to proffer a renewed public interest showing in support of its existing ownership structure (or some other structure that exceeds the benchmark) or, in the alternative, may file a statement that it will elect to comply with the benchmark.

179. If FTS decides to make a renewed public interest showing, it may address any factors it believes relevant to that determination. However, because this case involves examination of the Section 310(b)(4) public interest question ten years after the applicant's initial authorization, we particularly invite comment on certain matters that

are not addressed in the record. In particular, we specifically invite FTS to submit information regarding the costs or other impacts of achieving benchmark compliance and the extent to which achieving compliance would adversely affect the public interest.[92] If FTS elects to comply with the benchmark, its submission must indicate how and when it intends to achieve compliance.

180. Other persons may comment on FTS' submission 30 days thereafter. FTS may reply to said comments in not more than 15 days. The Commission intends to rule promptly thereafter.

IX. ORDERING CLAUSES

181. Accordingly, IT IS ORDERED, that the Petition to Deny, filed April 12, 1994, by The Metropolitan Council of NAACP Branches, IS DENIED.

182. IT IS FURTHER ORDERED, that the Further Supplement to the Petition to Deny: Fox' Misconduct in connection with the Gingrich Book Deal, filed January 27, 1995, by Metro NAACP, IS DENIED, and that the Motion to Strike filed on February 6, 1995, by Fox Television Stations, Inc., IS DISMISSED AS MOOT.

183. IT IS FURTHER ORDERED, that FTS SHALL, not later than 45 days from the release date of this Order, SHALL SUBMIT a showing as to why its existing ownership structure, or some other structure that exceeds the statutory benchmark, is in the public interest or, in the alternative, NOTIFY the Commission whether, how, and when it intends to bring its ownership structure into compliance with the statutory benchmark. Other persons may comment on FTS's notification or public interest submission 30 days after FTS's filing, and FTS may reply to any such comments no later than 15 days thereafter.

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[92] We also note that the Commission recently issued a Notice of Proposed Rulemaking, which proposed that the public interest standard for Section 310 (b)(4) be modified to include consideration of whether the primary markets of the foreign entity seeking to exceed the benchmark offer effective access to United States citizens and companies seeking to participate at a similar level as is being requested by the foreigner in the United States. See Market Entry & Regulation of Foreign-Affiliated Entities, FCC 95-53 (Feb. 17, 1995).

184. IT IS FURTHER ORDERED, that the application of Fox Television Stations, Inc. for renewal of license (File No. BRCT-940201KZ) IS GRANTED, subject to the outcome of the further Commission proceedings concerning any public interest submission or notification by FTS as described in the preceding paragraph.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

RE: FOX TELEVISION STATIONS, INC.
RENEWAL OF LICENSE OF STATION WNYW-TV

With the millions of words of information, vituperation, and speculation that have already been expended on this matter, one may well wonder why at this juncture I find it necessary to carry more verbal coals to this particular Newcastle. The answer is easy: in this welter of words, perhaps the only perspective on these events that has not been presented is mine, the only Commissioner still sitting who participated in the unanimous 1985 Commission vote on the Fox applications.

The time has come to give you my perspective. I can support this item, except for the decision to call for yet more comment prior to determining whether to waive Section 310(b)(4)'s foreign ownership limitations on behalf of Fox. In my view, the record as it stands today amply supports a decision to waive the statute's 25 percent benchmark without the need for further comment.

I have not spoken in detail of what went into my decision to approve the assignment of the Metromedia licenses to Fox in 1985 for several reasons. Chief among them, of course, was the allegation that, at the time of the Commission vote or at some point thereafter, Fox could have either intentionally misled or failed to be forthcoming with the Commission on the question of its ownership structure. If true, these allegations would have naturally required a reexamination of the public interest determination that I had previously made. I have therefore deliberately withheld final judgment pending the results of the staff's investigation into these matters.

That investigation has been exhaustive, and its results are now in. I have reviewed it carefully. It confirms the basis for my determination in 1985 that granting the applications would serve the public interest. Perhaps just as important, however, in my view the record also validates the key factors that would enable this Commission to make a similar public interest judgment today. The first key factor is that Fox is controlled both in law and in fact by an American citizen. The other key factor that was decisionally significant to me was that in approving the applications the Commission would finally be creating the long-sought but hitherto-unattained fourth broadcast network.

I fully agree with the finding that Fox was not guilty of either misrepresentation or lack of candor in presenting its proposed ownership structure to the Commission ten years ago. Although I cannot speak for other members of the Commission or for the staff, I for one was never in any doubt about what Fox intended for one very simple reason:

I asked. I asked, and Fox gave me what I considered then, and consider now, to be a perfectly frank response: that Rupert Murdoch, an American citizen, would control 76 percent of the voting stock of Fox. For that reason, it was, and still is, immaterial to me whether all, or part, of the equity ownership of the company resided with Fox's parent, News Corp. The item before us today finds that what I found to be true in 1985 continues to be true in 1995: Mr. Murdoch is, and has at all times been, in both de facto and de jure control of Fox.

Similarly, the creation of the fourth broadcast network was, and is, an overarching public policy goal that has been served by the creation of Fox. There is extensive factual evidence in the record about how clearly and compellingly News Corp.'s economic participation in the Fox structure over the last ten years has served the Commission's fundamental policy objectives of economic competition and viewpoint diversity. First, and most fundamentally, the Commission's approval of the applications in 1985 provided the physical infrastructure and economic foundation for the creation of the fourth national broadcast television network.[1] The Commission fully expected the Fox acquisition to lead to the development of this network.[2] And sure enough, the creation of the Fox station group and the emergence of the Fox Network has advanced the Commission's objective of providing competition to the established national broadcast networks and their affiliates.[3] The Fox Network has provided economic, programming, and marketing support to enable many independent UHF stations to achieve stability and profitability.[4] The presence of Fox has also enhanced the value and bargaining power of local affiliates of all networks in many markets.[5] Fox has increased the amount of locally-produced news programming on its owned stations[6] and made possible the expansion or creation of local news programming by Fox affiliates.[7] In the last four years, the number of Fox affiliates presenting local prime-time newscasts has increased from 15 to 50.[8] Anchored by the Fox-owned stations, the Fox Network also presents 19 hours per week of children's programming, including three hours per week of informational and

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[1] *Fox Comments, February 27, 1995 (hereinafter, "Fox Comments")at 76-79.*

[2] *See, e.g., Denvir Tr. at 41 (Chairman Fowler sought creation of a fourth network to compete with the three established networks).*

[3] *Fox Comments at 79-80.*

[4] *Id. at 80-83.*

[5] *Id. at 88.*

[6] *Id. at 84.*

[7] *Id.*

[8] *Id. at 84-85 and Appendix D.*

educational programs.[9]

It is also significant to note that Fox has increased the amount of programming addressing the interests of African Americans and other minorities.[10] In the process, Fox has provided a national platform for minority producers, writers, actors and other members of the creative community.[11] Indeed, even while the local Metropolitan Council of the NAACP was attacking Fox before the Commission, the Fox Network was being honored by the national NAACP with 22 Image Award nominations for its programming! In fact, Fox held a **majority** of the nominations in three of the Image Award categories.[12] Last - but certainly far from least - the Commission itself has previously acknowledged the public interest benefits that have resulted from Fox's activities.[13]

Notwithstanding how strongly the factors of American control and the creation of the fourth network counted in favor of approving the Fox acquisition, however, one might question whether, in voting to grant the applications in 1985, I unwittingly gave short shrift to the possibility that News Corp.'s capital contributions to Fox might substantially exceed the 25 percent benchmark. Here again, the item confirms my analysis at that time. The item before us shows that in 1985 the Commission had not clearly ruled that we would count a parent corporation's capital contributions in determining a subsidiary corporation's compliance with the 25 percent benchmark, making an explicit waiver necessary if they exceeded that amount. Indeed, the item demonstrates that the Commission's precedent on counting equity ownership since 1985 is perhaps most politely characterized as a moving target.

So in my judgment, in 1985 Fox did not need anything explicitly waived. To the extent its possible ownership structure was disclosed and before us for approval - which it was - I made an informed decision to approve it. In doing that I fully considered the issue of who was going to exercise control of the company, and I believed then, as I do now,

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[9] *Id. at 87.*

[10] *Id. at 89.*

[11] *Id.*

[12] *Fox Response to Supplement to Petition to Deny, December 2, 1993 at 11-12.*

[13] *See Fox Broadcasting Co., 5 FCCRcd 3211, 3213-14 (1990) (emergence of the Fox Network advanced the Commission's "longstanding" and "oft-stated" public interest goals of "fostering a competitive UHF service," "encouraging new national networks," and promoting "more, and more diverse, children's programming"); Evaluation of the Financial Interest and Syndication Rules, 8 FCC Rcd 3282, 3333 (1993) (Fox "has greatly enhanced" both source and outlet diversity).*

that the creation of the fourth network was a compelling public interest goal. From this perspective, it matters little either in law or in logic that the words "waiver" and "benchmark" were not explicitly used in 1985 in reference to the possible equity ownership structure. I knew what the decisionally significant issues were. They were the same issues that would have been decisionally significant had they been couched in terms of a waiver. I made my decision based on them.

Which brings me squarely to today. I understand that the vagaries of our evolving precedent and the need to tidy up our regulatory desks might warrant this Commission's desire to use the correct legal incantations to waive the benchmark. I am perfectly willing to do this. More to the point, I am perfectly willing to do this <u>today</u>.

Throughout the ten-year period in which Fox has been a licensee, there has never been, and there is not now, even the slightest implication of any foreign influence, much less "undue" foreign influence, over the management and operations of Fox. Given that the prevention of such undue foreign influence is the very reason the alien ownership provision was enacted, to do anything short of granting Fox any waiver that might now be necessary strikes me as a solution in search of a problem. In my view the record unequivocally shows that Fox is operating in the public interest notwithstanding its not being in compliance with a statutory interpretation that post-dates the Commission's 1985 decision by ten years. From this perspective, it seems pointless to spend much effort wondering what it might cost Fox to bring itself into compliance. For if Fox is operating in the public interest under its current ownership structure, it stands to reason that <u>any</u> costs Fox would incur to change this structure would not be required in the public interest. Under those circumstances, for us to impose such costs would be, by definition, unnecessary, arbitrary and capricious.

I can imagine some possible arguments that might be made in favor of requiring Fox to achieve a greater degree of compliance with the 25 percent benchmark. It could, for example, be argued that we have never before waived the 25 percent benchmark in a broadcast case, and to do it here - where virtually all the equity ownership is in the hands of News Corp. - would simply be too big a step to take.

I have not found any Commission precedent to support the notion that the Commission can only grant waivers incrementally. The reason for this is simple: if a licensee happens not to be complying with one of our rules and the public interest is nevertheless being well-served, why enforce that rule against that licensee at all? This is particularly persuasive in this case, where the statutory interpretation in question was made a decade <u>after</u> the applicant began operating and where it can be documented that the applicant has been operating in the public interest. Why mess with success?

Then there could be the related argument that, if we grant a waiver of this magnitude now, how can we possibly deny <u>any</u> waiver request in the future? And I suppose my answer here is, bring me another waiver request that exhibits the same unique

circumstances as this one, including an American-controlled licensee operating the fourth network for ten years under apparent statutory authority, and I undoubtedly would feel constrained to grant the same relief. Suffice it to say, however, that I for one am not lying awake at night worrying that such an unlikely waiver applicant is apt to land on our regulatory doorstep. And in the meantime, I would propose that we proceed with any future waiver requests that do not feature the unique circumstances pertaining to this case exactly as we always have and always will - on a case-by-case basis. Granting the waiver in this case will affect that approach, and the outcomes of those future cases, not one iota - unless, as I say, some future waiver applicant manages to wind up in precisely the same set of circumstances that Fox is in today - a highly unlikely, if not impossible, scenario.

The above analysis would also apply to what might be characterized as the "Aha, but suppose something changes?" argument. The gist here would be that, even if the current Fox ownership structure is serving the public interest, what happens if Mr. Murdoch chooses to retire? Then what? The simple answer is that, when and if something material changes, the Commission will have the opportunity to approve any change, or disapprove any change, or even change any change, in the normal course of our customary assignment and transfer processes. There is no need at this juncture to fix what isn't broken.

So my bottom-line analysis of the waiver issue goes something like this. On the one hand, we have Fox. Fox obtained all the authorizations needed at the time to establish its broadcast network in 1985. We find Fox to be in the complete control of an American citizen. Although its parent corporation is a foreign entity and owns virtually all its corporate equity capital, Fox has never at this or at any other time been found to be under any influence whatsoever from its parent. Moreover, under its current corporate structure Fox has injected new competitive vitality into the television broadcast marketplace, and in doing so has been found by this Commission to be meeting the public policy goals we had in authorizing its station acquisitions.

On the other hand, we have a law. As of today, the Commission is interpreting this law to bar foreign corporations from holding more than 25 percent of the capital stock in domestic corporate broadcast licensees. The purpose of this law is to assure that such foreign entities do not exert undue control over the programming and other operational activities of broadcast licensees or otherwise prevent them from operating in the public interest. This law did not clearly apply to Fox's equity ownership structure until ten years after we approved the acquisitions with which Fox launched a fourth American broadcast network. Finally, this law has always been waivable upon a persuasive showing that, under the facts of an individual case, exceeding the 25 percent benchmark would serve the public interest.

In deciding this waiver issue I must confess that I am not a lawyer, so my approach to communications problems is perhaps somewhat different, although I do have expert legal

advisors. So I tend to ask where, in any given matter, do reason and justice predominate? Which viewpoint scores the most points morally, ethically, practically, and legally?

I find guidance in a quote from a great President, Franklin Delano Roosevelt. Back in 1940 President Roosevelt expressed his view of the role that administrative agencies should play in government. He said, "A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decision with an eye that looks forward to results rather than backwards to precedent and to the leading case. Substantial justice remains a higher aim for our civilization than technical legalism."

In this case I believe the legal record, reason and justice all warrant our waiving the 25 percent benchmark on behalf of Fox today. It is only because I continue to believe that this result will ultimately be reached, and reached quickly, that I will not dissent to the part of the item that defers decision on this issue to another day. Nevertheless, I must emphasize my view that it is past time to conclude this proceeding and refocus our attention on matters in which the merits are not as clear-cut as they are here. It is time to free Fox from costly litigation and unsubstantiated accusations and grant it the freedom and assurance to again devote all its resources to providing the public a strong, competitive, diverse, American fourth network.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 95-197
Washington, D.C.

In the Matter of	)	
	)	
ENCORE MEDIA CORPORATION	)	
	)	
Request for Declaratory Ruling	)	CSR 4367-R
Regarding Multiplexing of Premium	)	CSR 4236-R
Services Under the Commission's	)	
Cable Television Rules	)	
(Sections 76.901(b)(3), 76.981)	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1995 **Released:** May 8, 1995

By the Commission:

I. INTRODUCTION

1. On September 16, 1994, Encore Media Corporation ("Encore") filed with the Commission a request for a declaratory ruling (CSR-4367-R) that its thematic multiplex offering complies with the multiplex exemption to the cable television rate regulations set forth in the Commission's regulations.[1] On October 11, 1994, Showtime Networks, Inc. ("Showtime") filed comments opposing Encore's petition to which Encore filed a reply on October 26, 1994. On March 17, 1994, Showtime filed a request for declaratory ruling (CSR-4236-R) also requesting clarification of the multiplex exemption with respect to the same issues addressed in this proceeding, i.e. Encore's compliance with the multiplex exemption. The parties have requested consolidation of the two proceedings and this requested is granted.[2]

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[1] 47 C.F.R. § 76.901(b) (exclusion of qualifying multiplexed service from the definition of a regulated cable programming service tier).

[2] Subsequent to the filing of the petitions in this proceeding, the Commission, in its *Sixth Order on Reconsideration and Fifth Report and Order in Docket 92-266*, FCC 94-286, adopted rules that generally exempt "new product tiers" as defined in Section 76.987 from rate regulation. It appears likely that in most situations ENCORE's offering would, even if

2. We conclude that Encore satisfies the multiplex exemption. As set forth in greater detail below, Encore's thematic multiplex, which consists of commonly identified video programming that is not bundled with a regulated service tier, meets the requirements of Section 76.901(b).

II. DISCUSSION

3. Encore owns and operates the premium service known as ENCORE which shows movies from the 1960s, 1970s and 1980s. The service was first offered as a premium, "stand-alone" service in 1991. In 1994, Encore began to offer this service as a thematic multiplex, breaking the primary channel's programming into six thematically distinct channels for which there is a single charge -- Love Stories, Westerns, Mystery, Action, True Stories and WAM!/America's Youth Network.

4. Although cable programming service tiers are subject to Commission regulation, multiplexed premium services are exempted from the definition of cable programming service. According to the report accompanying the House version of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress intended

> for these "multiplexed" premium services to be exempt from rate regulation to the same extent as traditional single channel premium services when they are offered as a separate tier or as a stand-alone purchase option.
>
> * * * * *
>
> it is the intent of the Committee that "multiplexed" premium services such as HBO1, HBO2, and HBO3 also be excluded from the term "cable programming services." The Committee does not intend that the trend toward offering multiple channels of commonly-identified video programming, that traditionally or historically were offered on a per-channel or stand-alone basis, should result in an otherwise exempt service becoming subject to rate regulation.[3]

5. Section 76.901(b) of the rules, which implements the above, provides:

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subject to regulation as a jurisdictional matter, be exempt as a practical matter under 76.987 from the "benchmark" or cost-of-service rate regulation process. Nevertheless, ENCORE's petition continues to be of relevance in terms of which specific provisions of the rules apply to system operators delivering this service.

[3] *See* H.R. Rep. No. 102-628, 102 Cong., 2d Sess. 80, 90.

> Cable programming service includes any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than . . . (3) A combination of multiple channels of pay-per-channel or pay-per-program video programming offered on a multiplexed or time-shifted basis so long as the combined service: (i) Consists of commonly-identified video programming; and (ii) Is not bundled with any regulated tier of service.

6. Encore contends that its thematic multiplex approach satisfies the regulatory criteria for the exemption. Encore emphasizes three basic points to underscore its view that its thematic multiplex consists of commonly identified video programming. First, each of the multiplexed channels is identified and marketed as an ENCORE channel. Second, the themes and genres of the multiplex channels represent the same themes subsumed within the primary ENCORE channel. Third, the programming for the multiplex channels is drawn from the common inventory pool that serves the primary ENCORE channel. In addition, Encore contends that neither the regulatory language nor the legislative history supporting the regulation limits the exemption's reach to "time shifted" programming. In Encore's view, the multiplex exemption reaches multiplex offerings involving little or no program overlap among the multiplexed channels.

7. Showtime, on the other hand, argues that Encore's multiplex is not the kind of service that meets the multiplex exemption. Unlike other premium multiplex offerings, Encore offers thematically distinct programming across its multiplex channels. In Showtime's view, this is not the kind of multiplex programming Congress had in mind when it discussed multiplexed premium services in the House Committee report accompanying passage of the 1992 Cable Act. Showtime further argues that Encore's definition of commonly-identified video programming would emasculate the exemption by sweeping any program channels within the exemption as long as it carries a common name and draws from a common inventory pool.

8. As the House Report indicates, Congress was aware of the trend toward the multiplexing of premium services and did not seek to place obstacles in the way of this development. At the same time, however, Congress, by contouring the multiplex discussion around services of a type "traditionally or historically" offered on a per-channel or stand-alone basis involving commonly-identified programming, limited the reach of the "exemption." Current regulations also exclude from the multiplex exemption, channels bundled with regulated tiers of service, underscoring that the exemption was designed for premium services offered traditionally on an a la carte, stand-alone basis.[4]

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[4] *See* 47 C.F.R. § 76.901(b)(3)(ii). *See also Report and Order and Further Notice of Proposed Rule Making in Docket 92-266*, 8 FCC Rcd 5631, para. 326 (1993) and Section 76.986 ("For purposes of this Section "multiplexed" channels shall be treated as one

9. Here, we conclude, Encore satisfies these criteria. Its primary service has an established profile as a premium movie service historically and traditionally offered on a per channel, stand-alone basis. It has been advertised to cable systems and subscribers as a premium, pay-per-channel service. The primary ENCORE channel launched as a premium stand-alone channel in April, 1991, and by the end of 1993, had a subscriber base of 4.3 million.[5] It has not been offered traditionally as a tier service for incorporation in a basic or expanded basic service package. In its multiplexed form, the service generally draws its programming from the type of programming that comprises the primary source -- the ENCORE Channel. The programs spread across the multiplex represent the kinds of programs offered traditionally or historically on the single channel, stand alone primary service, come from a common pool of programming and are advertised and labeled as "Encore" channels. Although thematic segments constitute a variation of the multiplexing approach that preceded the Encore service, the Encore multiplex satisfies the "common identity" requirement of 47 C.F.R. § 76.901(b) by maintaining the programming character of the primary stand alone service that spawned the multiplex.

10. We are not persuaded that Encore's qualification for the exemption should turn on whether the primary ENCORE channel shows the very same programs offered across the multiplexed tier. As ENCORE notes, because Congress cited the HBO multiplex as an acceptable example of an exempt offering, HBO's multiplex model provides guidance on the characteristics that Congress deemed sufficient to satisfy the exemption criteria of "premium service" and "commonly-identified video programming." According to Encore, HBO, at the time Congress acted, was not simply time-shifting its standard HBO channel but was counter-programming on each channel so as to reach a different audience segment on each channel at a given time. This pattern on HBO continues, according to Encore, with a recent (1993-1994 time period) study indicating that the percentage of titles exhibited on HBO2 and HBO3, but not HBO, in any given month averaged 51%.[6] Thus, we conclude that it is sufficient that the character of the multiplexed programming is consistent with the kind of programming traditionally available on the primary channel. We recognize that the value of the multiplex flows, in part, from the expanded capacity to offer a higher number of offerings to subscribers. The multiplex format increases viewer choice and program diversity. We will not discount the value of these objectives through a rigid requirement that mandates complete program overlap between the primary channel and the various multiplexed extensions of that service.

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channel.")

[5] National Cable Television Association, Cable Television Developments, April, 1994 at 14-C.

[6] Exhibit 6 of Encore's request which references "Data from VIDEOPLEX Magazine sent to HBO Multiplex subscribers."

11. A final issue remains regarding negative option billing.[7] Showtime contends that Encore must obtain affirmative subscriber consent before offering the Encore multiplex to preexisting ENCORE subscribers. The essence of Showtime's claim is that Encore's multiplex service is so distinct from the primary ENCORE channel that it constitutes a new service that cannot be billed to subscribers absent their affirmative consent. We conclude, however, that Encore's multiplex, to the extent it satisfies the requirements set forth in this *Order*, is the same premium service that spawned the multiplex. As such, and based on the single charge for the service, the multiplex division of the ENCORE channel is a service restructuring or addition that does not change the fundamental nature of the offering and is consistent with the provisions of Section 76.981 of the rules.[8] Like other premium services that have been offered to subscribers in multiplexed forms, including Showtime's multiplex, we will not require operators to obtain affirmative consent to provide the Encore multiplex to preexisting subscribers of the primary ENCORE channel.

III. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the petition of Encore Media Corporation (CSR 4367-R) for a declaratory ruling that its multiplex offering satisfies the multiplex exemption of 47 C.F.R. § 76.901(b) is granted. IT IS FURTHER ORDERED, that the petition of Showtime (CSR 4236-R) IS DENIED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[7] *See* 47 U.S.C. § 543(f). The negative option billing provisions are applicable to premium as well as tier services. *See e.g., Report and Order and Further Notice of Proposed Rule Making in Docket 92-266*, 8 FCC Rcd 5631, para. 440 (1993) and *Third Order on Reconsideration in Docket 92-266*, 9 FCC Rcd 4316. para. 127 (1994).

[8] 47 C.F.R. § 76.981(a) provides in relevant part that a "cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name." Section 76.981(b) further states that this provision shall not preclude certain adjustments, including "the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier or service, [or] the restructuring or division of existing tiers of service . . . provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations."

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-211

In the Matter of	)
	)
DANIEL R. GOODMAN,	)
RECEIVER; DR. ROBERT CHAN	)
	)
Petition for Waiver of Sections	)
90.633(c) and 1.1102 of the	)
Commission's Rules.	)

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 1995; Released: May 24, 1995

By the Commission: Commissioner Quello concurring and issuing a statement.

I. INTRODUCTION

1. This order addresses petitions for waiver of Section 90.633(c) of the Commission's Rules,[1] which establishes the maximum period for Specialized Mobile Radio (SMR) licensees to construct their facilities and commence operation. The petitions were filed on March 15, 1994 and March 21, 1994, respectively, by Dr. Robert Chan and Daniel R. Goodman. On April 6, 1994, the Private Radio Bureau released a Public Notice seeking comments on the Goodman and Chan petitions.[2] Based on the facts set forth in the petitions and the comments filed in this matter, we conclude that the waivers requested by Chan and Goodman should be granted to the extent described below.

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[1] 47 C.F.R. § 90.633(c).

[2] Public Notice, DA 94-305, April 6, 1994, 59 Fed. Reg. 17547 (1994). *See* also Letter to Rosalind K. Allen, Chief Commercial Radio Division, from Russell H. Fox, Esquire, December 9, 1994 (attaching a list of all licensees affected by Goodman matter).

II. BACKGROUND

2. The Goodman and Chan petitions are brought by or on behalf of approximately 4,000 individuals who have obtained 800 MHz conventional SMR licenses on General Category channels[3] by using the services of one of several companies that are the subject of an enforcement action brought by the Federal Trade Commission. These companies have used TV infomercials and telemarketing solicitations to promote SMR licenses as "investment opportunities" for individuals. The typical service offered by these companies is to prepare SMR applications for a substantial fee (usually $7000 per application). The companies typically induce potential customers to purchase these services by representing that SMR licenses have great value that can be recouped through subsequent resale of these licenses, but do not emphasize the obligations to which each licensee is subject.

3. The Commission has taken steps to protect the public against deception and misinformation. In December 1992, the Commission issued a public "Consumer Alert" regarding SMR licensing.[4] Among other things, the alert stated that SMR licenses could be obtained directly from the FCC for a $35 fee, that licensees would be required to construct facilities within eight months or lose their licenses, and that licenses could not be sold or transferred prior to construction. The Commission also developed a consumer information packet, which is sent to individuals who contact the Commission after being solicited by SMR application companies. The Commission also assisted the Federal Trade Commission (FTC) in preparing a consumer information pamphlet issued in January 1994.

4. The Commission has actively cooperated with the Federal Bureau of Investigation, the FTC and the Securities Exchange Commission in investigations of SMR application companies. In January 1994, one such investigation culminated in a lawsuit brought by the FTC in U.S. District Court against four companies, Metropolitan Communications Corp., Nationwide Digital Data Corp., Columbia Communications Services Corp., and Stephens Sinclair Ltd. (the "Receivership Companies").[5] In its complaint, the FTC alleged that approximately 4,000 individuals who were assisted by the Receivership Companies in obtaining licenses for conventional SMR channels were defrauded and misled as to the FCC

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[3] The General Category is a group of 150 channels that the Commission made available in 1990 for use by all categories of eligible users in the 800 MHz band. *See Report and Order*, Trunking in the Private Land Mobile Radio Services for More Effective and Efficient Use of the Spectrum, PR Docket No. 87-213, 5 FCC Rcd 4016 (1990); 47 C.F.R. § 90.615. The General Category is available for licensing to conventional SMR systems, which operate on one to four channels with no trunking allowed, *i.e.*, users must scan each channel for available air time. In addition, General Category licensees who meet certain loading criteria may use the channels as part of a trunked system.

[4] *See* Fact Sheet/Consumer Alert, No. 30798, December 1, 1992.

[5] FTC v. Metropolitan Communications, et al., No. 93 CIV 0142 (JFK) (S.D.N.Y., filed January 11, 1994).

rules by the sales practices of these companies. The first phase of the scheme involved selling consumers application preparation services for FCC licenses at excessive cost. In the second phase of the scheme, certain defendants used misrepresentations to solicit the purchase of shares in partnerships that would purportedly construct and operate SMR systems in various cities. On January 14, 1994, the court issued a preliminary injunction freezing the assets of the Receivership Companies and their principal officers and appointed Daniel R. Goodman as Receiver of the Receivership Companies.

5. Waiver Requests. On March 15, 1994, Dr. Robert Chan filed a petition for waiver on his own behalf as licensee of five SMR stations acquired through two of the Receivership Companies. Dr. Chan requested an additional year in which to build and place his facilities in operation.[6] On March 21, 1994, Daniel Goodman, the court-appointed Receiver, filed a petition for waiver on behalf of all SMR licensees who have received licenses through the Receivership Companies. Noting that virtually no construction had taken place under these licenses and that automatic license cancellation was imminent, Goodman requested an eight month extension of time for all such licensees to construct and commence operations, starting from the petition grant date.[7] Goodman also requested a 120-day emergency stay of all automatic cancellations of licenses during the pendency of the petition.[8] Goodman indicated that its request for waiver was limited to the Commission's eight month construction deadline, and no request was made to waive any of the other requirements that apply to General Category channels.[9]

6. On April 21, 1994, Goodman filed a supplement to his initial waiver request asking that we waive the Commission's requirement of a separate waiver fee for each individual license covered by the petition.[10] On April 29, 1994, Goodman filed another supplement requesting that the Commission (1) issue a stay (retroactively effective January 14, 1994) of any cancellation of the exclusive SMR authorizations during the pendency of the waiver request; (2) suspend the mailing of automatic cancellation notices to affected licensees; and, (3) if the request for waiver is denied, grant the licensees a 120-day period from the date of

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[6] Chan Petition at 1.

[7] Goodman Petition at 7. The Receiver also requested that the Commission immediately provide licensees with at least 120 days from the date the waiver request was filed to comply with the provisions of Section 90.633 because the sale and transfer of their SMR licenses are subject to Commission approval and also must be submitted by the Receiver to the District Court for approval. Goodman Petition at 8.

[8] Goodman Petition at note 7.

[9] *See* Goodman Petition 11 and note 12 ("The Requesting Parties do not ask for recognition of the channels as a single system for the purpose of trunking or other technical requirements, *merely extension of the construction deadline.*")(emphasis added). *See also* 47 C.F.R. § 90.633(b).

[10] Goodman Fee Petition at 1.

such denial in which to construct their facilities.[11] In this supplemental request, Goodman stated that petitioners needed "an additional eight month period to construct and load their licensed facilities," indicating that compliance with the Commission's mobile loading requirements for the General Category channels was contemplated.[12]

7. Public Notice and Comments on Petitions. On April 6, 1994, the Private Radio Bureau issued a Public Notice seeking comments and replies on the Goodman and Chan petitions. Approximately 300 comments and five replies were received.[13] Many comments in support of the Goodman petition were submitted by individual licensees who received their licenses through the services of the Receivership Companies. In addition, the FTC has submitted a letter to the Commission supporting the Goodman petition.[14] Oppositions to the waiver requests have been filed by major SMR operators, frequency coordinators, and trade associations, including Nextel Communications, Inc., the American Mobile Telecommunications Association, the Association of Public-Safety Communications Officials-International, National Association of Business and Educational Radio, American Digital Communications, the Industrial Telecommunications Association and Council of Independent Communication Suppliers, Express Communications, TC3M, Inc., and Brown and Schwaninger.

III. DISCUSSION

A. Receiver's Standing as Party in Interest.

8. Background and Comments. As a threshold issue, several commenters argue that Goodman lacks standing to bring a waiver petition on behalf of multiple SMR licensees.[15] These commenters note the apparent lack of an express agreement between the licensees (individually or as a group) and the Receiver for the latter to represent them. In addition, commenters assert that Goodman's status as Receiver is insufficient to make him a real-party-in-interest with respect to the licenses at issue. The Receiver's duty is to receive monies due and owing to the Receivership Companies so that these funds can be used to satisfy the debts

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[11] Goodman Supplemental Petition at 4.

[12] *See* Goodman Supplemental Petition at 1.

[13] Comments and replies were due on or before May 13, 1994 and May 27, 1994, respectively. *See* the attached Appendix for a list of parties filing comments and reply comments.

[14] FTC Comments at 1.

[15] *See, e.g.*, American Digital Communications, Inc. (ADC) Comments at 2, Express Communications, Inc. Comments at 5, and Brown and Schwaninger Comments at 2.

of these companies and their creditors.[16] Because any monies received from the sale of the licenses would go directly to the licensees and not to the Receivership Companies, commenters argue, the Receiver has no interest that would be affected by the request.[17]

9. In reply, Goodman argues that he is the proper entity to submit waiver requests on behalf of all the licensees. First, Goodman argues that he should be recognized as having standing for reasons of administrative convenience because requiring each licensee to file an individual waiver petition would be unduly burdensome.[18] Goodman also contends that because many of the licensees entered into management agreements with the Receivership Companies, the licensees depend on the Receiver to take whatever actions are necessary to preserve the validity of their authorizations.[19] Finally, Goodman alleges that no licensee has objected to the Receiver's filing of a petition on behalf of all licensees.[20]

10. Decision. We conclude on grounds of administrative convenience that Goodman should be deemed to have standing to file the instant petition. Although this case involves multiple licenses, weighing the merits of the waiver request for each licensee involves evaluating a common fact situation rather than a diverse set of facts for each licensee. Because the request for waiver for all of the licensees is based on common facts, it would be a waste of time and resources to require each licensee to file individually. There is also no evidence that any licensee has objected to the Receiver filing the waiver petition on his or her behalf. For purposes of the Goodman petition, therefore, we believe that it is in the public interest to consider the Receiver as representing the interests of all licensees whose interests are affected by the FTC's action against the Receivership Companies.

B. Waiver of Application Fees

11. Petition. Section 1.1102 of the Commission's Rules requires waiver petitions to be accompanied by a $105 fee for each rule section that the petitioner seeks to waive multiplied by the number of stations to which the petition applies.[21] Although the Goodman petition was filed on behalf of multiple licensees, Goodman has submitted only a single $105

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[16] Brown and Schwaninger Comments at 2.

[17] *Id.*

[18] Goodman Reply Comments at 7.

[19] *Id.*

[20] *Id.* at note 9.

[21] On June 6, 1994, the Commission amended its Schedule of Application Fees, 47 C.F.R. § 1.1102 et seq. The new application fees are effective July 18, 1994. *See* Order, 59 Fed. Reg. 31009 (1994).

waiver petition fee instead of a separate fee for each affected license.[22] The Chan petition was not accompanied by any fee payment. Goodman has requested that the Commission waive the requirement of a separate fee for each license and accept the single payment as sufficient. Goodman argues that the public interest warrants waiving the fee requirement because the purpose of the underlying waiver petition is to allay potential financial hardship to defrauded licensees and a fee waiver would avoid a further depletion of the licensees' funds.[23]

12. Comments. The Public Notice did not solicit comment on the Receiver's request for waiver of fees because it was filed subsequent to the release of the Public Notice.[24] Nevertheless, a few comments on the issue of waiving filing fees were submitted. Express Communications in particular opposes waiving the fee requirement on the grounds that there is no provision in the rules to lump multiple requests together for a single fee.[25]

13. Decision. Section 1.1115(a) of the Commission's rules permits the waiver of fees where good cause is shown and where waiver would promote the public interest.[26] If we were to require a separate fee for each licensee that is covered by the Goodman petition, the total fees due (based on 4,000 licensees) would total $420,000. We believe that waiving this fee amount is in the public interest. The Goodman petition was filed in an attempt to limit the financial harm caused to licensees by the alleged fraudulent conduct of the Receivership Companies. The petition also raises substantive issues that we believe should be decided on the merits. We therefore conclude that good cause exists to waive the filing fee requirement. For the same reasons, we also waive the fee requirement with respect to the Chan petition on our own motion.

C. Waiver of Construction and Operation Deadline

14. Petition. In support of his waiver petition, Goodman contends that the individuals who obtained licenses through the Receivership Companies are threatened with an aggregate loss of $28,000,000 (calculated based on 4,000 licenses times the $7,000 application fee paid by each licensee) if their licenses are allowed to expire.[27] Goodman states that neither the licensees nor the Receiver have the financial or technical resources to construct SMR facilities

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[22] Fee Supplement at 1.

[23] Goodman Fee Petition at 2.

[24] By requesting public comments on the waiver requests filed by Mr. Goodman and Dr. Chan, the Private Radio Bureau was not ruling on the adequacy of the filing fees tendered. *See* Public Notice, DA 94-305, at 2.

[25] Express Communications Comments at 9.

[26] 47 C.F.R. § 1.1115(a).

[27] Goodman Petition at 8.

pursuant to their authorizations within the required eight-month period.[28] Goodman states that he is in the process of negotiating and finalizing the sale and assignment of thousands of these licenses to large, legitimate, publicly-traded SMR companies.[29] Because Commission rules do not allow the assignment or transfer of unconstructed SMR licenses, however, Goodman requests that the licensees be given additional time to construct so that they can then sell the stations and potentially recoup their investment. Without such an extension, Goodman contends, the number of licenses that may be transferred will be substantially diminished.[30] The Receiver contends that if the licensees are granted additional time to construct, they will be able to place in operation and load their channels as required by our rules.[31]

15. The Receiver acknowledges that many of the licensees on whose behalf the waiver is sought were unaware of their obligations under the Commission's Rules, including the intention to construct and operate and the eight month construction requirement. Goodman contends that their lack of knowledge should be excused, however, on the grounds that the licensees were defrauded by the Receivership Companies concerning their responsibilities as licensees.[32] Goodman also notes that the Commission has granted extended construction periods for licensees of wide-area, multi-site SMR systems and urges us to treat the individual licensees in this case as similarly entitled to extended construction authority on a collective basis.[33] Finally, Goodman argues that a waiver grant would not compromise efficient use of spectrum or otherwise be contrary to the public interest.[34] If additional time for construction is allowed, he argues, the systems can be constructed and the Commission's policies fulfilled with only a brief delay.[35]

16. The Chan petition raises essentially the same issues as the Goodman petition with respect to the five SMR licenses held by Dr. Chan. Dr. Chan states that he acquired licenses through two of the Receivership Companies and that one of the companies, Nationwide Digital, had undertaken to construct and operate Dr. Chan's SMR facilities.[36] Because

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[28] *Id.* at 5.

[29] *Id.*

[30] *Id.*

[31] *See* Goodman Petition at 11 and note 12; Goodman Supplemental Petition at 1. *See also* discussion *supra* at paras. 5 and 6.

[32] *Id.*

[33] Goodman Petition at 10-11. For extended implementation provisions, *see* 47 C.F.R. § 90.629.

[34] Goodman Reply Comments at 8-10.

[35] *Id.* at 8.

[36] Chan Petition at 1.

Nationwide does not have the capability to construct the stations in time, Dr. Chan requests a one-year extension so that he can employ other business entities to construct and operate his SMR stations.[37]

17. Comments. The FTC supports the Goodman petition on the grounds that an extension of the construction and operation deadline would help to alleviate the financial injury suffered by the 4,000 licensees.[38] Licensees would directly benefit by a rule waiver, the FTC contends, because it would give the Receiver adequate time to negotiate arrangements with legitimate SMR operators to manage and/or construct the stations.[39] The FTC further argues that these arrangements would indirectly benefit other investors who have been defrauded by the Receivership Companies because reducing the licensees' damages will preserve the assets of the Receivership Companies as a source of redress for other claims.[40]

18. Many individual licensees have submitted comments in support of the Goodman petition.[41] These commenters echo Goodman's argument that an extension of time is necessary to allow construction of their SMR stations because of the delay engendered by the Receivership Companies' fraudulent scheme.[42]

19. Petition opponents argue that extending the construction and operation deadline is an inappropriate remedy for licensees who made speculative and ill-advised investments.[43] The purpose of the waiver request, opponents contend, is not to promote development of SMR service, but to protect the interests of a group of licensees who hope to make a profit

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[37] *Id.* Like Goodman, Chan does not request waiver of the mobile loading requirements that apply to General Category licensees. *See generally* Chan Petition.

[38] FTC Comments at 1.

[39] *Id.*

[40] *Id.* at 2.

[41] Some licensees have also filed individual waiver requests. *See, e.g.*, Robert H. Tilden Comments and Pendleton C. Waugh Comments.

[42] *See, e.g.*, comments filed by Charles F. Keaveny, Mark Erickson, Dorothy I. Adams, Hal Bond, Vincent J. Driscoll, John R. Wagner, Gary E. Leascher, Frank Mayer, and Lonzo Poindexter.

[43] *See, e.g.*, TC3M, Inc. Comments at 2. Opponents also assert that the "extended implementation" provisions are not applicable to the instant case because there is no claim that the 4,000 systems require a longer than normal construction period because of purpose, size or complexity, or that they are to be part of a coordinated or integrated wide-area system. *See, e.g.*, American Mobile Telecommunications Association, Inc. (AMTA) Comments at 7-8.

from selling their licenses to established operators.[44] Opponents assert that the Commission cannot act as the guarantor of the public's investment decisions.[45] Opponents also argue that licensees are charged with knowing and fulfilling the responsibilities of holding a license.[46] If these licensees were in fact victims of fraud, opponents argue, they have legal remedies other than an extension of the construction and operation deadline.[47] Opponents assert that the Commission would better serve the public interest by allowing these licenses to lapse so that the Commission can relicense these frequencies directly to legitimate operators.[48]

20. Decision. To obtain a waiver of our construction requirements, petitioners must demonstrate that their circumstances are unique, that there is no reasonable alternative solution within existing rules, and that good cause exists to justify the requested relief. [49] The thrust of petitioners' argument is that they should be excused from the eight-month construction requirement because they were the victims of fraud by the Receivership Companies. As discussed more fully below, we will waive our rules to the extent necessary to put petitioners in the same posture as other Part 90 CMRS providers now subject to a twelve-month construction period under our rules.[50] Specifically, we will grant petitioners a four-month extension from the effective date of this *Memorandum Opinion and Order* to construct and commence operations. A four-month extension augments petitioners' original eight-month construction period to the degree necessary to give them the twelve months to build their systems that we allowed for all Part 90 CMRS licensees in the *Third Report and Order* in General Docket No. 93-252.[51] We emphasize, however, that all other requirements in our rules continue to apply. In particular, as licensees on General Category channels, petitioners

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[44] *See, e.g.*, ADC Comments at 8. The National Association of Business and Educational Radio, Inc. (NABER) submits that the instant case is not unique because a plethora of application mills have opened for business and are likely to create additional situations like the one before us here. A waiver grant, it argues, will actually encourage further speculative filings. NABER Comments at 7.

[45] NABER Comments at 3, AMTA Comments at 12, and AMTA Reply Comments at 3.

[46] Express Communications Comments at 7. *See also*, TC3M, Inc. Comments at 2, and ADC Comments at 5.

[47] AMTA Comments at 11.

[48] Commenters such as ADC submit that in those areas that are wait-listed, numerous qualified applicants are available to make use of SMR spectrum as soon as it is available for reassignment. ADC Comments at 7. In addition, the Indiana State Police oppose the waiver request based on their need for radio systems serving the public safety. Indiana State Police Reply Comments at 2.

[49] 47 CFR § 90.151. *See* Northeast Cellular Telephone Company v. FCC, 897 F. 2d 1164 (U.S. App. D.C. 1990) (granting a waiver in the absence of good cause is improper).

[50] *Id*. *See also* 47 C.F.R. § 90.167(a) (as amended).

[51] *See Third Report and Order*, GN Docket 93-253, 9 FCC Rcd 7988 (1994) at paras. 177-184.

do not earn exclusive use of their channels unless they have achieved loading of 70 mobiles per channel. To the extent that petitioners have less than 70 mobiles operating on each of their channels, additional licensees may be licensed to use those channels. We believe our decision to grant petitioners limited relief in this manner in no way undermines our commitment to strict enforcement of our construction rules, which are intended to promote efficient use of SMR spectrum and the availability of service to the public.

21. Since the inception of the SMR service, our rules have required licensees to comply with strict time limits for constructing and loading their systems. These limits were viewed as essential to ensuring that SMR spectrum would be used efficiently,[52] and to promote the rapid deployment of services to the public. We have enforced these rules strictly in order to recover unused spectrum for relicensing.[53] We have particularly noted the importance of enforcing our construction requirements with respect to the General Category channels, on which the petitioners are licensed. In this regard, we have stated our intent "to aggressively enforce Section 90.633 of our Rules requiring that conventional 800 MHz systems be placed in operation eight months after the date of the grant of the license for the system."[54]

22. Our policy of strict enforcement of our construction requirements has led us to deny extensions in a wide variety of circumstances in which the failure of SMR licensees to comply with our construction or loading requirements resulted from circumstances that were the result of the licensees' own business decisions or of risks commonly assumed by all licensees.[55] For example, in *P & R Temmer*, an SMR licensee sought an extension of our construction and loading requirements because it had been required to change its transmitter

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[52] *See Memorandum Opinion and Order*, Docket No. 18262, 51 FCC 2d 945, 960 (1975) (construction and loading requirements used in lieu of financial qualification requirements to ensure effective use of SMR frequencies).

[53] *See Aeronautical Radio, Inc.*, 3 FCC Rcd 6994 (Priv. Radio Bur. 1988) (automatic cancellation policies "ensure that scarce spectrum space is either put to prompt use by the existing licensee or returned to the Commission for reassignment to another ready and able to construct"). By 1990, through the compliance review efforts of the Private Radio Bureau, SMR licenses for 824 channels had been recovered for failure to construct. *Notice of Proposed Rule Making*, Amendment of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, PR Docket No. 90-481, 5 FCC Rcd 6401, 6403 (1990).

[54] *Report and Order*, Trunking in the Private Land Mobile Radio Services for More Efficient Use of the Spectrum, PR Docket 87-213, 5 FCC Rcd 4016, 4020 (1990) (*General Category Order*). In this proceeding, we declined to adopt a proposal to relax our prohibition on transfer of unconstructed licenses in the General Category, citing the possibility of misuse of the Commission's rules and abuse of process. *Id.*

[55] A similar standard applies to construction extension requests by common carrier licensees. Section 22.43(b)(1) of our Rules provides that an extension will be granted only if the licensee shows that the failure to complete construction is due to causes beyond his or her control. The rule specifically prohibits extensions for delays caused by lack of financing, lack of site availability, or failure to order equipment in a timely manner.

site to eliminate technical problems and because of the equipment manufacturer's alleged reluctance to aggressively market the system to potential customers.[56] In denying the waiver, we concluded that problems with site selection and marketing strategy were not beyond the licensee's control because they resulted from independent business judgments made by the licensee.[57] We have applied this standard in other circumstances as well, denying extension requests by SMR licensees who have been delayed by such factors as interference from adjacent buildings, zoning difficulties, inability to obtain construction permits, and equipment delivery problems.[58]

23. In this respect, the facts of the present case bear a strong resemblance to the facts in *Robert A. Baker, Receiver*,[59] a case involving individuals who were solicited by a company to prepare and file cellular applications on their behalf. Shortly before the filing deadline, the FTC brought a fraud action against the company and the court appointed a receiver to assist the victims of the alleged fraud. The receiver sought waiver of the deadline to enable the affected parties to submit applications and the request was supported by the FTC. In a decision affirmed by the Commission, the Common Carrier Bureau denied the waiver request. The Bureau concluded that the individual applicants were responsible for the consequences of their decision to use a mass application preparer, and that there was no evidence of compelling circumstances that would justify waiver of the filing deadline.[60] If the

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[56] *P&R Temmer, d/b/a Mobile Communications Service Company*, 93 FCC 2d 1051, 1062, *aff'd sub nom.* P & R Temmer v. FCC, 743 F. 2d 918 (D.C. Cir. 1984).

[57] *Id.* at para. 33. We also distinguished the standard for granting construction extensions in the SMR context from the more liberal standard sometimes applied in broadcast cases. The Commission pointed out that the public interest could be served by granting a construction extension to a broadcast licensee who has previously been selected by comparative hearing based on public interest criteria, but that the SMR rules rely on the marketplace to determine who should be entitled to spectrum. *Id.* at para. 34.

[58] *See, e.g., Business Radio Communications Systems, Inc.*, 102 FCC 2d 714 (1985)(construction delay caused by zoning challenge not a circumstance beyond licensee's control); *Texas Two-Way, Inc.*, 98 FCC 2d 1300 (1984), *aff'd sub nom.*, Texas Two-Way, Inc. v. FCC, 762 F. 2d 138 (D.C. Cir. 1985)(licensee responsible for delay resulting from interference caused by construction adjacent to transmitter site because site selection was an independent business decision); *AAT Electronics Corporation*, 93 FCC 2d 1034 (1983) (decision not to market service aggressively because of equipment uncertainties is within licensee's control). The Private Radio Bureau has also denied numerous requests for construction extensions under similar circumstances. *See, e.g.*, Letter from Terry L. Fishel, Chief, Land Mobile Branch, Private Radio Bureau, to John W. Harris (August 24, 1993)(licensee failed to place timely order for equipment); Letter from Terry L. Fishel to Katherine H. Luengo (January 20, 1993)(extension request based on licensee's building of new production facility, revamping of distribution, and replacement of fleet fails to show unique circumstances justifying waiver); Letter from Terry L. Fishel, Private Radio Bureau, to Gilbert Carreau (March 25, 1991)(construction permit delays do not justify extension).

[59] *Memorandum Opinion and Order*, No. 64400-AL (Common Carrier Bureau), released April 18, 1986, *review denied*, FCC 86-197, April 21, 1986 (*Baker*).

[60] *Baker* at para. 7.

applicants had been defrauded, the Bureau further stated, the appropriate remedy was to seek indemnification from the party that had committed the fraud, not belated insertion into the lottery.[61] The Bureau concluded that the "tribulations of a mass application preparer cannot excuse the individual applicants from their responsibilities."[62]

24. We also conclude that the principles set forth in *Baker* are relevant here. Each individual licensee who hired the Receivership Companies bears responsibility for the decision to rely on a third party to act on his or her behalf in meeting the obligations imposed by the Commission's rules. Assuming that these licensees were defrauded by the Receivership Companies,[63] they have recourse to other legal remedies specifically designed to provide redress. The Commission's mandate, however, is to allocate and assign radio spectrum to serve the public interest.[64]

25. Our decision to grant the petitions in part is motivated by our determination that granting the waiver is equitable in light of the fact that during the pendency of the Goodman and Chan requests, we changed our construction requirements for SMRs licensed in the General Category and all CMRS providers licensed under Part 90 of our Rules. In the *Third Report and Order* in the CMRS docket, we adopted a uniform twelve-month construction period for all CMRS providers licensed under Part 90 of our Rules. We indicated that such a rule change would eliminate the obvious disparity between Part 90 and Part 22 and would further the goal of comparable regulation for all substantially similar services.[65] Recently, on grounds similar to our decision here, the Private Radio Bureau granted 220 MHz non-nationwide licensees a four-month extension to construct their stations.[66] Petitioners and future applicants should not interpret our decision today as a sign of any diminution of our resolve to enforce the twelve-month construction period that applies to General Category and other Part 90 CMRS licensees. Like the licensees in *Baker*, petitioners are fully responsible for the consequences of their decision to use a mass application preparer.

26. We nonetheless find that the requests at hand are distinguishable from *Baker* and

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[61] *Id.* at para. 9.

[62] *Id.* at para. 10.

[63] The action brought by the FTC has not yet been resolved. In any event, a finding that the Receivership Companies were guilty of fraud would not change the outcome of the waiver requests.

[64] *See Baker* at para. 1 n.2.

[65] *See Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) at para. 177. *See also* 47 C.F.R. § 90.167(a) (as amended).

[66] *See* "Private Radio Bureau Extends Time to Construct Non-Nationwide 220 MHz Stations Through April 4, 1995 and Lifts Freeze for Applications to Modify Site Locations," Public Notice, DA 94-902, Aug. 19, 1994.

other cases in which we denied construction time extensions on the grounds that we changed our rules while the Goodman and Chan petitions were pending before us. In the interests of fairness, we will grant petitioners the relief necessary to place them in the same posture as other SMR licensees that are subject to a twelve-month rule. We will not, however, permit petitioners who have not achieved loading of 70 mobiles to treat their channels as exclusive. Such relief was not requested and, indeed, was deemed by the Receiver to be unnecessary.[67]

27. We are granting petitioners only limited relief, and for the reasons stated above. To grant this relief for the reasons stated by the petitioners would undermine the objectives of our construction requirements. As we have noted on numerous occasions, the purpose of the prohibition against assignment or transfer of unconstructed licenses is to deter speculation and trafficking in licenses.[68] Even if we assume that many of the licensees at issue here were unaware of or misinformed about this rule, as appears likely, petitioners do not dispute that these licensees were primarily interested in acquiring SMR licenses as a form of investment that they could subsequently sell for a profit. We believe it would be incongruous to grant waivers to licensees on this basis when we have consistently denied them to licensees who had a *bona fide* intent to construct and operate SMR systems but were unable to construct because of adverse business decisions.[69] The Commission has previously noted that frequencies in the 800 MHz band are extremely scarce in many areas, making it difficult for applicants to obtain channels.[70] Moreover, the licenses at issue here are for General Category frequencies, which may be licensed not only to SMR operators but also to public safety entities and other categories of private radio users.[71]

28. We also want to be clear that by granting limited relief for the reasons stated, we do not intend to reward and encourage further speculative activity by entities like the Receivership Companies and possibly invite abuse of the Commission's processes. The problem of application mills is one that we have encountered and continue to encounter in a

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[67] *See* discussion *supra* at paras. 5 and 6.

[68] *See, e.g., General Category Order*, note 50 *supra* (transfers of unconstructed licenses prohibited on General Category channels to prevent trafficking); *accord, Notice of Proposed Rule Making*, PR Docket No. 93-144, 8 FCC Rcd 3950, 3960 (1993) (800 MHz SMR service). The restriction on transfer of unconstructed licenses is not unique to SMRs. We have recently applied this restriction, with limited exceptions, to all CMRS services licensed on exclusive channels. *See Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) at para.393.

[69] *See supra* at para.22.

[70] *Notice of Proposed Rule Making*, Amendment of Part 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, PR Docket No. 90-481, 5 FCC Rcd 6401, 6403 (1990).

[71] *See* 47 CFR § 90.615.

number of services.[72] If we were to grant a waiver on the grounds that such action was needed to afford relief to the unwitting victims of a few such companies, the result almost inevitably would be to encourage numerous similar requests. Furthermore, we would be compelled in each case to ascertain whether the licensee in fact was a victim of fraud or was claiming fraud as a pretext. Finally, the grant of a waiver for the reasons stated by petitioners could inadvertently become a tool used by the application mills themselves in their solicitation of new clients, resulting in more unsuitable applicants seeking Commission licenses.[73] We do, however, affirm our commitment to pursue ongoing initiatives and explore new ways to deter the practices of application mills and alert the public regarding licensing fraud.

IV. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303, and Section 1.1115 of the Commission's Rules, 47 C.F.R. § 1.1115, the request for waiver of Section 1.1102 of the Commission's Rules, 47 C.F.R. § 1.1102, filed by Daniel R. Goodman, Court-appointed Receiver, on April 21, 1994, is GRANTED.[74]

30. IT IS FURTHER ORDERED that, pursuant to the authority of Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303, and Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151, the requests for waiver of Section 90.633(c) of the Commission's Rules, 47 C.F.R. § 90.633(c), filed by Dr. Robert Chan and Daniel R. Goodman, on March 15, 1994 and March 21, 1994, respectively, are GRANTED to the extent indicated above. The supplemental request filed by Daniel R. Goodman on April 29, 1994, and the request for reconsideration of 14 cancelled licenses filed by Daniel R. Goodman on May 31, 1994, also are GRANTED.[75]

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[72] For example, we have previously addressed the problem of speculative applications in the 220 MHz, cellular, and MMDS services. *See Memorandum Opinion and Order*, PR Docket No. 89-552, 7 FCC Rcd 4484, 4486 (1992) (220 MHz service); *Third Report and Order*, CC Docket No. 85-388, 4 FCC Rcd 2440, 2441-2442 (1988) (cellular); *Report and Order*, PR Docket No. 92-80, 8 FCC Rcd 1444, 1446-1447 (MMDS).

[73] Indeed, we note that the FTC has recently initiated an action against a telemarketing firm for representing to potential clients (including victims of previous licensing frauds) that it can obtain extensions of construction deadlines from the Commission. FTC v. United Consumer Services, et al., Civ. No. 1:94-CV-3164-CAM, Complaint for Injunctive and Equitable Relief (N.D. Ga., filed Nov. 28, 1994).

[74] We waive the fee requirement for filing a waiver request for Dr. Chan on our own motion.

[75] *See* Letter to Rosalind K. Allen, Chief Commercial Radio Division, from Russell H. Fox, Esquire, December 9, 1994 (attaching a list of all licensees affected by the Goodman matter).

31. IT IS FURTHER ORDERED that this *Memorandum Opinion and Order* is effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

COMMENTS

Henry Abraham
Dorothy I. Adams
Kenneth R. Ahler
Joan G. Allen
American Digital Communications
American Mobile Telecommunications Association (AMTA)
Nolan K. Anderson
Diana Ankenbauer
Association of Public Safety Communications Officers (APCO)
Richard F. Atchison, Jr.
Faye E. Barbee
Milton C. Barbee
Anthony Barbieri, Jr.
Brad Barnes
Richard P. Barnett
Ruby Lee Barnhart
Ruth & Michael Beesley
Hester H. Behle
David Behrens
Judy Behrens
Lisa Behrens
Walter Bentel
Walter M. Bentel
Roger M. Berkley
Anna R. Berry
Richard A. Berry
David L. Bettis
Benjamin & Barbara Biderman
Randle L. Blankenship
Hal Bond
Milton Borden
Cindy & Rosa Borensztein
Richard C. Boucher
Emily N. Bowden
Marshall H. Bricker
John R. Bright
Larry Brockhouse

Brown & Schwaninger
Judy Ann Brown
Wilson C. Bullach
Philip Burlant
Doris T. Burrow
William T. Burton
John & Leola Butler
Anthony J. Calamunci
Olga Calzada
Paula J. Cameron
John Carroll
Charles A. Carter
Mary I. Carville
Patrick J. Carville
Gordon M. Case
Rene C. Cassano
Candice Casto
Robert Chan
Daryl Chapman
Randy Cheatum
Robert Y. Chen
Eva H. Chiu
Shin Chung Chiu
Brian Christie
Gary A. Cohen
Sidney Collender
William R. Condzella
Roger Cone
Lisa D. Cook
Glenn H. Costanza
Richard N. Cox
Roy J. Craig
Eric Cramer
Gregory E. Cranmer
Jean B. Creekmore
Bill G. Crowell
Jerald A. Crump
Thomas M. Cullar
P. Joe Dahl
Charlotte Dailey
Jean C. Daly
Robert E. Davis
Gilbert DeGerlia
Dwayne DePriest

Vera DeSpain
H. Thomas DeWees
Rosemary L. Delagrave
Robyn R. Doege-Brennan
Clyde E. Douglas
Alan O. Draheim
Vincent J. Driscoll
Dewey Dyer
Robert J. Eldridge
Barbara Epis
Mark Erickson
Marvin Euteneur
Express Communiactions
Federal Trade Commission
Steve Fisher
Sylvia G. Fisher
Jamson Fitzpatrick
Vurnette Fluelling
Lonnie F. Force
Earl W. Fox
Charles L. Freeland
Donald P. Froelich, Sr.
Anne Frost & Mary Martin
Linda K. Frye
Michael Funk
Rose Anne Funk
Vonciel Gaines
Robin T. Gambrel
Maria Z. Gazzolo
George Gerhart
Gib Gettinger
Abdul Ghafoor
Robert J. Gilroy
Jmaes Goellner
Wifredo A. Golez
Elsa T. Gonzales
Betsy B. Goodner
Lorene G. Goodwin
Darwin Gott
Lowell B. Granstaff
Randy Gregory
Kevin R. Grelle
Melba Stibbs Guerra
Roger A. Gulick

Malcolm C. Gustafson
Jeffrey B. Gwinn
John Halabrin, Jr.
Carl J. Hafner
James J. Hall
Maurice J. Halpin, III
Nancy Hansel & Marvin Euteneur
Albert Hanson
Loyd L. Hardin
Terry Hawn
William E. Hayman
Nancy Hayward
William J. Hecker
Randy Hedges
Norman Heinberger
Roy S. Helm
Cleatus E. Hickman
Robert Hill
Casey Hines
Lloyd & H. Jean Hirtz
Bonny Hoeft
Evelyn Hoey
Howard Holder
Robert Holler
Synthia R. Holt
Herbert & Gertrude Holtgeerts
Gerald L. Honick
Garry K. Hoover
Douglas E. Hopley
Horizon Communications
Katherine Elizabeth Horswell
Arthur R. Horvath
Don F. Hough
Calvin L. Howard
John T. Hower
Edward & Cecile Huggins
Ursula Hughes
Thomas A. Hull
Dan Hyatt
Marsha Hynes
Industrial Telecommunications
Association, Inc. (ITA)
Robert E. Jackson
Anita Jenkins

Carla Johnson
Dale L. Johnson
David H. Johnson
Roy M. Johnson
Dale A. Kading
Fred Kanthac
John Karnei
N.R. Karve
Charles F. Keaveny
Andrew H. Kelly
Deborah L. Kistler
Bill Knight
Don F. & Doris M. Kocian
William Koehler
John Konegni
Laurence Kroeger
Arthur Kuwahara
Thomas E. Lammers
Inez M. Landers
Doyle Lane
Wiley G. Lastrapes, Jr.
Wilma J. Lawson
Son M. Le
Victor Le
Francis E. Le Jeune
Gary E. Leascher
Gordon Lee
Samuel Lennox
Lucy Lewis
Robin D. Lewis &
Kimberly K. McKee-Lewis
William F. Lindoerfer
Mark Lindquist
Michael Littleton
John W. Luckett
Robert Lynn
David Mahler
Oma L. Maples
Stan Mar
William E. Martin
Richard L. Maynard
William E. McDaniel
William M. McDonald
Kevin P. McGarry

Michael J. Megrdichian
Wayne J. Menz
Michigan Public Safety Frequency
Advisory Committee
Russell J. Miller
Antoinette Mire
Curtis P. Mire
Ross Mire
Johnson Molter Molter
Billy Moncrief
Moses Montal
Douglas E. Morris
Ralph A. Morton
Mary Mosely
Henry Mosher
John K. Mosher
William R. Moss, II
Mike Mokieka
Frank Moyer
Richard P. Mueller
Christopher L. Mullen
James Musacchio
National Association of Business &
Educational Radio
Roy C. Neumann
George S. Newton, Jr.
Nextel Communications
Victor H. Norden
Seth S. Nyenya
Martin E. O'Connor
Francis E. O Neill
Richard K. Olisky
Geraldine & Percy Palmer
Elizabeth Panowitz
Felyce Parker
Paul B. Pater
Marguerite Perry
Don Pfeiffer
Pierre Radio Paging & Telephone, Inc.
James Pietrowski
Lonzo Poindexter
Kenneth J. Polo
Gladys E. Post
Felix K. Potakey

Ola M. Poulard
James A. & Mina R. Powers
Carl O. Preis
Peter F. Rawlings
Rayfield Communications
Charles W. Rea, II
R A R E Inc.
Jackie Rager
Josephine Reichlin &
Janet G. Herrera
Michael & Barbara Reiniger
Joe W. Reissig
Beverly L. Reyff
Anthony F. Rhaney
Randy L. Ritchie
J.B. Robertson
Mary E. Robertson
Odell L. Robinson
Alexander E. Rodi, Sr.
Phillip Roston
Kunal K. Roy
Joseph C. Russell
Stephen J. Russell
George O. Sailor
Joseph Salvati & Larron Webb
William P. Sandman
Adam Santo
Dennis Sawinski
Holley R. Scarberry
William H. Schaeffer
Don Schiman
Albert Schoneberger
Marjorie Schwartz
Patrick Schwartz
Francis Scorca
Bessie Seiffert
William W. Seiffert
Clyde W. Sell
Janice D. Sessions
Richard Setteducati
Tony Sgarlatti
J. Dan & Mildred M. Shaver
Vijay Sharma
J. Dan Shaver

James Shaw
Nema H. Shirley
Gary W. Siegfried
James J. Singer
Edna Smith
Edward E. Smith
Ernest & Carrie Smith
Howard M. Smith
Jim Smith
Joseph & Vanesa Smith
Robert E. Sonnenburg
David Spiegelman
Boras E. Spivak
Walter D. Stafford
Larry S. Stanley
Pete Stevenson
Chrissa Strickland
Rick Strickland
Robert D. Sullivan
James & Lillian Sullivan
Duane O. Sumrall
Dorothy Swann
TC3M, Inc.
T.G. Diversified, Inc.
Muriel Taffel
Steve M. Taylor
Joseph C. Thames
Charles Tignor
Robert H. Tilden
Robert H. & Catherine Tilden
Jeanne & William Todd
Douglas Toll
Michael Joseph Toumayan
Ermo J. Trocchio
James Van Winkle
Robert Ventresca
Diane Vitton
Carrol R. Voss
Muriel D. Wade
John R. Wagner
Pat Wanek
Donald J. Ward
Sheridan R. Warner
Pendleton C. Waugh

Mavis Waul
Kurt M. Weigel
John L. Welch
Scott Whitmore
Hiram & Susanne Wiest
Thomas R. Wilcox & Suzanne M. Spaulding
Glen M. Willeford
Angie Willson
J. Hobart Wilson
John S. Wilson
Bruce Wimmer
Steve Wimmer
W.C. Wofford
Lily Wood
Charles G. Yacenda
Theresa D. Yarbrough
Robert Yocum
A. Michael Young
Harold Zakeosian
John L. Zenk, MD

REPLY COMMENTS

American Mobile Telecommunications, Inc.
Donald P. Froelich, Sr.
Daniel R. Goodman
Indiana State Police
Nextel Communications Inc.

Separate Statement
of
Commissioner James H. Quello

Re: ***Daniel R. Goodman, Receiver; Dr. Robert Chan***
Petition for Waiver of Sections 90.633(c) & 1.1102 of the Commission's Rules

I concur in the result of this *Memorandum Opinion and Order* but write separately to express my dissatisfaction, indeed perplexity, with the rationale. I believe that this is a simple matter of a routine request for waiver of our construction rules that ought to be granted as a matter of administrative discretion based on equity and common sense. The *MO&O*, however, goes on at length to argue in excruciating detail against the relief that is ultimately granted. I find it unnecessary, unseemly, and unproductive to engage in such regulatory *sturm und drang*.

Indeed, petitioners are granted herein no more relief than that already provided as a class to other licensees that did not even allege, must less demonstrate, petitioners' equitable *bona fides*. Ultimately, petitioners are granted an extension of time to construct that gives them only the same amount of time as that given to all other 800 MHz conventional Specialized Mobile Radio (SMR) licensees.[1] Whither the expenditure of superfluous legal analysis?

This matter comes before the Commission upon a petition for waiver by a Receiver in Bankruptcy for approximately 4,000 individuals. The petition is supported by a sister agency, the Federal Trade Commission, which met in extraordinary session to request that the Federal Communications Commission grant the petition so as not to jeopardize on-going enforcement actions that had culminated in judicial proceedings. Essentially, the Petitioner Receiver in Bankruptcy is asking the FCC to allow him to do his job, i.e., prevent waste of the underlying assets during judicial proceedings.

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[1] *See Third Report and Order*, GN Docket 93-253, 9 FCC Rcd 7988 (1994) at 177-184.

The Petitioner is working closely with the FTC to salvage whatever assets remain and, thereby, alleviate the financial injury to the 4,000 licensees. Grant of the instant petition constitutes a large part of the defrauded parties' prayer for relief. If the instant petition for waiver is not granted, the majority of the 4,000 licensed radio stations will not be built; therefore, the licenses would be cancelled for failure to construct. This would have the practical effect of delaying service to the public and the pecuniary effect of loss of almost twenty-eight million dollars ($28,000,000).

Upon review, *inter alia*, of the foregoing facts and circumstances, the FTC brought suit in U.S. District Court against putative "application mills". The suit alleges fraudulent trade practices against four companies that prepared applications for radio licenses and allegedly contracted to operate such systems on behalf of the class in bankruptcy. The District Court, in granting a preliminary injunction, made a finding that complainants have shown a substantial likelihood of success on the merits.

The *MO&O* makes much of the assertion that the licensees have other means of legal redress. Obviously, these licensees -- which the District Court has found to have made a *prima facie* showing as defrauded parties -- are actively pursuing legal remedies in other fora. This Commission has been asked, and has the authority, to halt vitiation of the remaining assets, *viz.*, the radio licenses, during the pendency of the legal proceedings. I believe that we should exercise such authority because it is the right thing to do. In legal parlance, it is the equitable decision.

Furthermore, although I am not a lawyer, I do not think the *Baker* decision[2] is determinative precedent for the decision at hand. Notwithstanding the similarity of the facts and the procedural posture in *Baker* to those in the instant matter, *Baker* is distinguishable on the following grounds:

1. The *Baker* decision adjudged potential licenses, that is, applications to be submitted for a licensing lottery and did not involve, as here, licenses already granted by this Commission. The alleged fraud in *Baker* occurred before the investors entered the FCC process. Goodman/Chan, however, involves extant licenses with the investors allegedly being deceived as to the construction and operating requirements. While waiver of the filing deadline in *Baker* may have resulted in an "unfair"

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[2] Robert A. Baker, Memorandum Opinion and Order, No. 64400-AL (Common Carrier Bureau)(rel. April 18, 1986) rev. den., FCC 86-197 (April 21, 1986).

lottery process, grant of the construction deadline waiver in Goodman/Chan will further the FCC's goal of providing new communications services to an unserved public.

2. The *Baker* decision was decided under a different licensing procedure and a different regulatory structure. The advent of auction authority and the creation of the Commercial Mobile Radio Service (CMRS) have significantly altered this Commission's practices and procedures. Although maintaining the integrity of our licensing scheme is important, we must not lose sight of our fundamental role of deciding what is in the public interest. Strict enforcement of the construction guidelines would harm the public interest by delaying competitive provision of communications service to unserved communities.

3. The FCC should not make decisions in a vacuum. Anyone who has read my previous statements knows that I firmly believe that the essence of regulatory practice is to weigh all legitimate factors and do "substantial justice" as opposed to blind reliance on legal technicalities. Cooperation and deference (what the lawyers refer to as 'comity') to opinions and recommendations of other federal agencies -- such as the Federal Trade Commission in this instance -- the courts, and state enforcement agencies, are often essential in determining and furthering the public interest. By blithely ignoring the recommendations and requests of other agencies, the FCC may unwittingly hinder their efforts.

These factors militate against application of the legal precedent of the *Baker* decision and in favor of granting the requested waiver of the construction deadlines without further ado. At the risk of overstating the obvious, in granting the four month extension, we are only affording the 4,000 individuals represented by the Petitioner the same construction period already granted to other licensees.

In summary, I believe granting the waiver of the construction deadlines under these circumstances is consistent with treatment afforded other licensees; would speed delivery of communications service by radio to the public; would not compromise efficient use of the spectrum; supports our own enforcement efforts and those of a sister federal agency; affords comity to another federal agency that specifically requested same; would mitigate the fraud perpetrated by unscrupulous application mills on unsuspecting citizens; and is otherwise in the public interest. In light of the foregoing, I would grant the requested relief without what I perceive to be detailed legal analysis in search of an issue.

FCC 95-212

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 95-72
End User Common Line Charges	)	
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: May 24, 1995 Released: May 30, 1995

Comment Date: June 29, 1995
Reply Date: July 14, 1995

By the Commission:

I. Introduction

1. In this Notice of Proposed Rulemaking, we invite interested parties to comment on a number of issues involving the recovery of local loop costs from residential and business end user subscribers. In particular, we seek comment on the application of End User Common Line Charges, hereinafter referred to as Subscriber Line Charges (SLCs), to local loops used with Integrated Services Digital Network (ISDN) and other services that permit the provision of multiple voice-grade-equivalent channels to a customer over a single facility.[1] We believe that the question of SLCs for ISDN and similar services must be considered in the broader context of competitive developments in the interstate access market, and the resulting pressure to reduce unnecessary support flows in order to ensure fair competition and preserve universal service.

II. Background

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[1] For purposes of this Notice, a "single facility" refers, for example, to both ordinary residential local loops and T-1 facilities, although residential local loops generally consist of a single pair of twisted copper wires, and a T-1 facility generally consists of two twisted copper pairs. The equivalent of up to 24 voice-grade channels can be provided over a T-1 facility using multiplexing equipment. See generally, William L. Schweber, Electronic Communications Systems at 685, Prentice-Hall, Inc. 1991.

A. ISDN and Other Derived Channel Technology and Services

2. ISDN permits digital transmission over ordinary local loops[2] and T-1 facilities through the use of advanced central office equipment and customer premises equipment (CPE). In order for a Local Exchange Carrier (LEC) to provide ISDN, it must have a digital switch in the central office serving the customer,[3] and substitute an ISDN line or trunk card for the standard cards[4] that would otherwise be used in the central office with the loop facilities serving the customer. The customer must also use special ISDN-capable CPE on its premises.[5]

3. Currently, LECs' offer two basic types of ISDN service.[6] Basic Rate Interface (BRI) Service allows a subscriber to obtain two voice-grade-equivalent channels and a signalling/data channel over an ordinary local loop, which is generally provided over a single twisted pair of copper wires.[7] Primary Rate Interface (PRI) Service allows subscribers to obtain 23 voice-grade

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[2] A local loop connects a subscriber's home or business to the local telephone company central office.

[3] It is possible to serve an ISDN customer through a distant ISDN-equipped central office if the local central office is not equipped with ISDN. Bell Atlantic Emergency Petition for Waiver at n.11, filed February 10, 1995.

[4] A subscriber loop interface circuit or line card in the local switch "is responsible for providing signals to the loop, sensing loop activity, and sending control signals to the phone at the end of the loop." William L. Schweber, Electronic Communications Systems at 492, Prentice-Hall, Inc. 1991. A trunk card performs similar functions for trunks, which generally connect LEC offices.

[5] The ISDN CPE used with an ordinary copper pair local loop can cost between $250 and $1,000. The ISDN CPE used with a T-1 connection can cost up to $15,000. See Bell Atlantic Petition at n.13.

[6] All of the Bell Operating Companies (BOCs) and some of the larger independent telephone companies offer ISDN in at least part of their service territory.

[7] The two voice-grade-equivalent channels, which are called the bearer or B channels, can be used for voice local exchange service or for data transmission at speeds up to 64 kbps. The third channel is a 16 kbps data channel, called the delta or D channel, which is used for signalling and packet data services. Bell Atlantic Petition at n.8.

equivalent channels and one data channel over a single T-1 facility with two pairs of twisted copper wires.[8]

4. A small business or residential customer with BRI can use voice service, access a database service, and send a facsimile, all at the same time, over a single local loop consisting of a twisted copper pair. Standard local exchange service permits only one of these activities at a time. BRI also permits customers to transmit and retrieve data at higher speeds than are currently possible using a standard analog local loop and a modem. PRI and other derived channel services afford larger business customers the advantages of digital service, including higher speed data transmission and greater accuracy. In addition, the use of ISDN and other services providing customers with multiple voice-grade-equivalent channels over a single facility (derived channels) can avoid or reduce the need for new cabling, and thus conserve space in existing conduit or intra-building cable vaults.

5. There are services in addition to ISDN that use derived channel technology to provide multiple channels over a single facility. For example, NYNEX provides FLEXPATH service, which provides a customer with 24 digital voice-grade-equivalent trunk channels over a T-1 facility between a suitably equipped central office and a digital PBX.[9] PBX Conversion Service, another NYNEX offering, provides digital trunking capability, with up to 24 trunk access lines, between a customer's digital PBX and an analog-to-digital interface located at the central office switch.[10] Other LECs also offer digital T-1 service with 24 voice-grade equivalent channels. NYNEX's Data Over Voice service provides customers with a voice grade channel and a data channel over a single copper pair. The LECs also use derived channel technologies within their networks to provide customers with individual local loops, as opposed to BRI or PRI ISDN for example. In such situations, the end user would not be aware that the LEC was using this technology to provide their local

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[8] In the case of PRI, the 23 B channels and the D channel can transmit voice or data at speeds up to 64 kbps. When a customer has more than one PRI connection at a given location, the B channels can share a single D channel. This permits the customer to use all 24 channels on the subsequent connections directly for their own communications needs. Id. at n.8.

[9] Memorandum Opinion and Order, NYNEX Telephone Companies Revisions to Tariff F.C.C. No.1, 7 FCC Rcd 7938 n.11 (Com. Car. Bur. 1992) (Rejection Order), aff'd, 10 FCC Rcd 2247 (1995).

[10] Id.

loop.[11]

B. Subscriber Line Charges

6. In the Access Charge Order, the Commission adopted rules prescribing a comprehensive system of tariffed access charges for the recovery of LEC costs associated with the origination and termination of interstate calls.[12] The access charge rules called for recovery of a major portion of the local loop costs assigned to the interstate jurisdiction through SLCs.[13] The remainder of local loop costs are recovered from interexchange carriers (IXCs) through the per minute CCL charge.[14] The CCL charges paid by the IXCs are reflected in the charges paid by interstate toll users.

7. Multiline business SLCs of up to $6.00 per line per

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[11] The LECs charge a single SLC for each of these channels. See, e.g., Rejection Order at para. 2.

[12] Third Report and Order, MTS and WATS Market Structure, CC Docket No. 78-72, 93 FCC 2d 241 (1983), recon., Memorandum Opinion and Order, CC Docket No. 78-72, 97 FCC 2d 682 (1983) (First Recon. Order), further recon., Memorandum Opinion and Order, CC Docket No. 78-72, 97 FCC 2d 834 (1984), aff'd in part, National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (1984).

[13] Although SLCs were initially adopted in the Third Report and Order in the MTS and WATS Market Structure proceeding, supra n.12, the issue of SLCs for residential and single line business customers was subsequently referred to a Joint Board composed of Federal Communications Commission and state regulatory Commissioners for a development of recommendations. The Commission implemented SLCs for residential and single line business customers based on the Joint Board's recommendations. Decision and Order, MTS and WATS Market Structure, CC Docket No. 78-72 and Amendment of Part 67 of the Commission's Rules, CC Docket No. 80-286, 50 Fed. Reg. 939 (1985); Report and Order, MTS and WATS Market Structure, CC Docket No.78-72 and Amendment of Part 67 of the Commission's Rules, CC Docket No. 80-286, 2 FCC Rcd 2953 (1987).

The interstate allocation of common line costs is 25% of the cost of local loop plant unless the LEC is eligible for compensation from the Universal Service Fund. In that case, the allocation is higher. 47 C.F.R. § 36.154(c)& Subpart F-Universal Service Fund.

[14] 47 C.F.R. § 69.105.

month became effective on May 24, 1984.[15] Residential and single line business SLCs of up to $3.50 per line per month were implemented in five steps, between June 1985[16] and April 1989.[17] In conjunction with the implementation of SLCs, the Commission took steps to waive these charges for low income subscribers.[18]

8. The SLC rate structure is designed to recover a greater proportion of local loop costs from multiline business customers than from residential and single line business customers. Multiline business customers pay the full interstate assignment of local loop costs up to $6.00 per month. In contrast, residential and single line business customers pay a SLC of no more than $3.50 per month, which is, in most cases, significantly below the full interstate assignment of local loop costs.

9. As the recovery of interstate loop costs through SLCs increased, the interstate Common Line loop costs that remained to be recovered through CCL rates paid by the IXCs decreased. This

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[15] The SLC for multiline business customers is capped at $6.00 per line per month or the full interstate assignment of common line costs per month, whichever is less. 47 C.F.R. § 69.104(c)&(d).

[16] Decision and Order, MTS and WATS Market Structure, CC Docket No. 78-72, and Amendment of Part 67 of the Commission's Rules, CC Docket No. 80-286, 50 Fed. Reg. 939 (1985).

[17] Residential and single line business SLCs are capped at $3.50 per line per month or the full interstate assignment of common line costs per line per month, whichever is less. 47 C.F. R. §§ 69.104 & 69.203 (a).

[18] Decision and Order, MTS and WATS Market Structure, CC Docket No. 78-72 and Amendment of Part 69 of the Commission's Rules, CC Docket No. 80-286, 50 Fed. Reg. 939 (1985) (initial subscriber line charge waiver). Decision and Order, MTS and WATS Market Structure, CC Docket No. 78-72 and Amendment of Part 69 of the Commission's Rules, CC Docket No. 80-286, 51 Fed. Reg. 1371 (1986) (lifeline assistance), aff'd on recon., 1 FCC Rcd 431 (1986), modified, Report and Order, MTS and WATS Market Structure, CC Docket No. 78-72 and Amendment of Part 69 of the Commission's Rules, CC Docket No. 80-286, 2 FCC Rcd 2953, 2955-56 & 2957-59 (1987), recon., 3 FCC Rcd 4552-53. Report and Order, MTS and WATS Market Structure, CC Docket No. 78-72 and Amendment of Part 69 of the Commission's Rules, CC Docket No. 80-286, 2FCC Rcd 2953 (1987) (Link Up America assistance), modified, Decision and Order, MTS and WATS Market Structure, Link Up America, and Amendment of Part 36 of the Commission's Rules, CC Docket No. 88-341, 4 FCC Rcd 3634 (1989).

resulted in substantial reductions in CCL rates. The Commission required AT&T to flow the reductions in per minute interstate CCL charges through to consumers in the form of reduced interstate toll rates.[19] Basic interstate toll rates decreased approximately 34% between 1984 and the end of 1992, much of this due to the shift in the recovery of common line costs from CCL rates to SLCs and the resulting stimulation in demand.[20]

C. Recent Decisions on SLCs for ISDN

10. The Commission did not address the application of SLCs to ISDN and other technologies that permit the provision of multiple voice grade channels over a two or four wire facility when it initially adopted the access charge regime. That issue was presented to the Commission for the first time by a 1992 NYNEX tariff filing. In Transmittal No. 116, NYNEX proposed to apply a single multiline business SLC to each T-1 facility used to provide a single customer with certain services, even though the T-1 facility provided that customer with up to 24 voice-grade-equivalent communications channels.[21] In order to qualify for this treatment, all of the channels derived from the T-1 facility had to be used to provide a single customer with either FLEXPATH digital PBX (FLEXPATH) Service, Analog to Digital Conversion PBX (Conversion PBX) Service, or ISDN Primary Service. At the time of the tariff filing, NYNEX applied one SLC for each derived channel used for local exchange service in the case of such services.

11. The Common Carrier Bureau rejected the Transmittal based on a finding that it did not comply with the rule governing assessment of SLCs.[22] In doing so, the Bureau relied on the Part

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[19] The reductions in interstate toll rates also stimulated demand for these services, increasing the number of switched access minutes over which the nontraffic sensitive CCL costs were recovered. This permitted additional CCL rate reductions.

[20] Monitoring Report, CC Docket No. 87-339, at Table 5.5, May 1994.

[21] Rejection Order, 7 FCC Rcd 7938 para. 2(1992). See para. 5 supra for a description of these services.

[22] Rejection Order, 7 FCC Rcd 7938 (CCB 1992). Section 69.104 of the Commission's rules, 47 C.F.R. § 69.104, provides for a monthly per line charge for end users that subscribe to local exchange service, stating that such charges shall be assessed for each line between the customer's premises and a Class 5 Office that is or may be used for local exchange transmissions.

36, Jurisdictional Separations, definition of a subscriber line as a "communication channel between a telephone station, PBX [Private Branch Exchange], or TWX (Teletypewriter Exchange Service) station and the central office,"[23] and the Part 36 definition of a channel as an "electrical path suitable for the transmission of communications between two or more points."[24] In the provision of derived channel services, the Bureau concluded that NYNEX was providing up to 24 electrical paths suitable for the transmission of communications even though the channels were provided over a single facility.[25]

12. In a recent Order, the Commission affirmed the Bureau's conclusion that Section 69.104 of the rules requires assessment of a SLC for each derived channel.[26] At the same time, the Commission recognized that many of the comments filed in that proceeding raised policy issues best considered in the context of a rulemaking proceeding.[27]

D. Competition

13. The interstate access market has changed since the Commission adopted the access charge rules at issue here. Alternative service providers such as Teleport, which is owned by a group of large cable companies,[28] and MFS have deployed fiber optic networks in core business areas of many large cities, providing interstate access services, and, in some areas, local exchange service as well.[29] Cable television companies, in addition to those with an ownership interest in Teleport, have

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[23] Rejection Order at para. 5, citing 47 C.F.R. Part 36 Glossary (emphasis added).

[24] Id.

[25] Rejection Order at para. 5.

[26] Order on Reconsideration, NYNEX Telephone Companies Revisions to Tariff F.C.C. No.1, Transmittal No. 116, FCC No. 94-356, released January 11, 1995, 10 FCC Rcd 2247 (1995).

[27] Id. at para 26.

[28] Teleport is owned by Telecommunications, Inc. (TCI) (29.9%), Cox Cable Communications (30.1%), Comcast Corp. (20%), and Continental Cablevision (20%). Telephone Interview with Rodger Cawley, Director Public Affairs, TCG (Teleport), May 23, 1995.

[29] "Fiber Deployment Update - End of Year 1993," Industry Analysis Division, Common Carrier Bureau, FCC (1994) at 31-41.

also entered the local telephone and/or interstate access market in certain areas, and have expressed an intention to enter the telephone market on a broader basis.[30] Interexchange carriers, such as MCI and AT&T, have also entered the market or announced an intention to do so.[31] In addition, the Commission has required expanded interconnection for the provision of special access service and switched transport.[32] New York State has also required LECs to unbundle their local loops in order to permit the competitive provision of local exchange service, and a number of other states are considering similar measures.

14. These developments tend to bring pressure to bear on support flows in the current access charge structure.[33] LEC rates

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[30] Hyperion Telecommunications, Inc., a competitive access provider operating in a number of states, is owned almost entirely by Adelphia Cable. See also "The Man who Would Save NY for NYNEX," New York Times, p. D1, April 3, 1995; "NCTA Targets Arizona, Missouri for Local Competition" Telecommunications Reports, at 13, March 20, 1995.

[31] For example, AT&T now offers local exchange service on a limited resale basis in the Rochester Telephone Company service area. Rochester Telephone Company Petition for Waivers to Implement Its Open Market Plan, FCC 95-96, released March 7, 1995. AT&T has also announced an intention to enter the local exchange market in certain other areas. "AT&T Applies for Local Service Authority in Two States," Telecommunications Reports, pp.35-36, May 8, 1995. MCI recently announced plans to build local access facilities. "The Man Who Would Save NY for NYNEX," New York Times, p. D1, April 3, 1995.

[32] Report and Order and Notice of Proposed Rulemaking, Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992)(Special Access Expanded Interconnection Order), recon., 8 FCC Rcd 127 (1992), vacated in part and remandedsub nom. Bell Atlantic v. FCC, No. 92-1619(D.C. Cir., June 10, 1994), on remand, Memorandum Opinion and Order, FCC 94-190, released July 25, 1994 (Remand Order); Second Report and Order and Third Notice of Proposed Rulemaking, Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 8 FCC Rcd 7374 (1993) (Switched Transport Expanded Interconnection Order), pet. for review pending sub nom. Bell Atlantic v. FCC, No. 93-1743 (D.C. Cir., filed Nov. 12, 1993.)

[33] For purposes of this Notice, "support flows" refer the to the benefits a particular group of customers receives when they pay less than the LEC cost of providing the services they use, while other customers pay more than the cost of the services that

that significantly exceed cost will tend to attract new entrants who may be able to offer service at lower rates. As a result, it may be necessary to reduce support flows that are not specifically tailored to produce social benefits.

III. Discussion

A. Overview

15. In this proceeding, we seek comment on the proper application of SLCs to BRI and PRI ISDN service provided to residential and business customers as well as to other services that permit the provision of multiple derived channels over a single facility. We believe that consideration of this issue must take into account competitive developments in the interstate access market, the need to ensure fair competitive ground rules, and the need to preserve universal service in a changing environment.

B. Analytical Framework

16. We believe that several basic principles should guide our resolution of these issues. While these considerations are sometimes in potential conflict with one another, we believe that they all must be considered to assure a sound, principled resolution of the issues before us in this proceeding.

17. This rulemaking proceeding gives the Commission an opportunity to reexamine existing rules, and make changes in light of new technologies and services. We must be careful to avoid erecting regulatory barriers to the development of beneficial new technologies. This is particularly important when these services and technologies can facilitate access to the benefits of the National Information Infrastructure. At the same time, we should not amend our rules to favor new technologies and services simply because they are new. Any difference in the regulatory treatment of new technologies and services must have a sound basis in public policy.

18. We also believe that it is desirable to avoid measures that could reduce the level of nontraffic sensitive (NTS) local loop costs now recovered through flat charges. We find that the implementation of SLCs has produced significant benefits, leading to lower interstate toll rates, and increased economic efficiency.[34] SLCs have also reduced the untargeted support flows

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they receive. See n.35 infra.

[34] As previously discussed, SLCs resulted in substantial reductions in interstate toll rates. This resulted in increased

between high and low volume toll users.[35] Any reduction in SLC revenues will tend to increase interstate toll rates because lower SLC revenues will cause LECs to seek to recover additional revenues through the per minute CCL charge.[36] We also believe that policies that would appear to reduce dramatically SLC charges to large business customers, but not to residential customers, must be carefully examined.[37]

19. Resolution of the issues in this proceeding should also take into account competitive developments in the interstate access market, and the accompanying need to identify and reduce unnecessary support flows, and reexamine rate structures predicated on an exclusively monopoly market structure. We believe that this is necessary in order to ensure fair competition and preserve universal service.

20. In light of competitive developments in the interstate access market, rule changes that could result in lower SLC revenues and higher CCL rates, thus potentially increasing support flows, must be carefully examined. To the extent that the LECs do not recover interstate NTS local loop costs through SLCs, they recover these costs through the CCL charge. The per minute CCL charge paid by IXCs and reflected in their interstate toll rates forces high volume residential and business toll users to pay charges that exceed the local loop costs they impose on the network. This creates incentives for high volume toll customers to use competitors even when the LEC would be the most efficient access provider. Increasingly, IXCs and large business customers have alternatives to use of LEC facilities for the origination and termination of interstate traffic, particularly in major urban business centers. In such areas, they can avoid

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demand for interstate toll services without commensurate increases in LEC costs since local loop costs are not traffic sensitive.

[35] Recovery of the interstate allocation of local loop costs through per minute toll charges forced high volume toll users to pay much more than the cost of the local loop facilities that they used. At the same time, low volume toll users failed to pay the full cost of their local loop facilities, regardless of their ability to do so.

[36] The Price Cap rules establish a single Price Cap Index (PCI) for the Common Line Category, which includes the SLC and CCL rate elements. Thus, a forecast decrease in SLC revenue permits the LEC to increase CCL rates, absent other offsetting factors. 47 U.S.C. § 61.46(d).

[37] See infra para. 26.

support flows inherent in the current access charge rate structure, including the CCL charge. In the long run, inefficient bypass of the LEC networks by high volume toll customers could threaten to undermine the support flows that foster universal service.

C. Options

1. Overview

21. There are potentially many ways that the number of SLCs for ISDN and similar derived channel services could be computed. At one extreme, we might require customers to pay one SLC for each physical facility serving a given customer, such as a standard local loop or T-1 facility. At the other extreme, we could maintain the current rule under which a SLC is applied to each derived communications channel.

22. There are also intermediate options. For example, the number of SLCs to be applied to ISDN facilities could be based on a ratio of the average LEC cost of providing a derived channel service, such as a BRI or PRI ISDN connection, to the average cost of providing an ordinary local loop or T-1 connection, including the line or trunk card costs in both cases. Under this option, a PRI customer would, for example, pay six SLCs if the average LEC cost of providing an ISDN T-1 connection, including line cards, is six times the average cost of providing an ordinary T-1 facility. It would also be possible to apply one SLC for every two derived channels, an option that would reduce by 50 percent the SLC revenues that would be generated under the current requirement that one SLC be assessed for each derived channel.

23. Another set of options would focus on the increasingly competitive interstate access market in determining how to compute the SLC to be paid by customers of derived channel services. One possibility is to combine a reduction in the currently required level of SLC charges for derived channel services with a small increase in the per-channel SLC for all local loops. Another option involves giving the LECs some flexibility in setting SLC rates for derived channel services, but modifying the price cap rules so that any reduction in SLC flat rate recovery does not increase the CCL rate.

2. The Per-Facility Approach

24. Under this approach, customers pay a single SLC per derived channel service connection. Thus, under this option, both BRI and PRI ISDN customers would pay a single SLC. Under a variation on this option, an ISDN BRI customer with one copper pair would pay a single SLC, and a PRI customer with two copper pairs would pay two SLCs. These approaches, which base the

number of SLCs on the physical loop facilities used by the customer, arguably reflect, in a general way, the loop costs imposed on the network by the customer. These options also would encourage the use of derived channel technology, and permit residential and business customers to take advantage of the substantial benefits of such channels at lower charges than are required under the current rules. This is particularly important since these services facilitate improved access to the National Information Infrastructure.

25. Widespread use of ISDN and other derived channel services under these approaches, which apply far fewer SLCs to such services than the current requirement, could reduce multiline business SLC revenues over time. This would tend to increase interstate toll rates as a result of increases in LEC CCL rates. This approach also appears potentially inconsistent with the general objective of reducing the untargeted support flows intrinsic to the existing per minute CCL charge.[38] In addition, applying SLCs based on the number of copper pairs used by a customer is not feasible if a customer's local loop is provided over coaxial or fiber optic cable. These options would also result in inconsistent treatment when the same derived channel technology is used to provide local loops in other service configurations.[39]

26. Moreover, these options lead to lower SLCs for large business customers than for residential and single line business customers. At present, residential and single line business customers generally pay monthly SLCs of $3.50 per line, while multiline business customers pay monthly SLCs of up to $6.00 per line. Under the per-facility approach, large business customers taking a derived channel service that provides 24 channels, such as ISDN PRI, would pay a single SLC capped at $6.00 per month, which equates to $.25 per month per voice grade equivalent channel. Residential and single line small business customers taking ISDN BRI would pay a single SLC capped at $3.50 per month, which equates to $1.75 per month for each voice grade equivalent channel. In contrast, a residential subscriber with a single standard local exchange line pays up to $3.50 per month in SLCs. Moreover, a household with a second standard local exchange or "teen" line pays $7.00 per month in SLCs even though LECs typically run two copper pairs to each residence, and thus the

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[38] See para. 18 & n.35 supra.

[39] For example, in its tariff, NYNEX proposed to continue to apply SLCs on a per-derived-channel basis when a single T-1 facility was used to provide more than one service to one customer. Rejection Order at para.6; Reconsideration Order at para 19.

use of a second line does not require additional plant investment.

3. Intermediate Options

27. An option that may represent a potential middle ground between the per facility and the per derived channel approaches would be to charge SLCs based on a ratio of the average LEC cost of providing a derived channel service, including line or trunk cards, to the average LEC cost of providing an ordinary local loop or T-1 facility.[40] Under this approach, a PRI customer, for example, would pay six SLCs if the LEC cost of providing an ISDN T-1 connection, including line or trunk cards, is six times the cost of providing an ordinary T-1 facility.

28. While we do not have data on the relationship between the cost of providing ISDN and non-ISDN local loops and T-1 facilities, we anticipate that this approach would produce SLC revenues for ISDN and other derived channel services that are higher than those produced by applying a single SLC per facility, but well below those produced by charging a SLC for each derived channel. If this is correct, this approach would affect demand for derived channel services less than a SLC for each derived channel. At the same time, it would not have the same potential to reduce multiline business SLC revenues and to cause increased interstate toll rates as the per facility approach has. As a result, this approach would also be more consistent with the objective of reducing the untargeted support flows intrinsic to the CCL charge in light of competitive developments in the interstate access market.

29. This approach does appear to depart from the averaging reflected in SLCs to date. Subject to the $3.50 and $6.00 caps, SLCs are based on averaged loop costs within each study area, and the Commission has not previously established lower SLCs for a particular service or group of customers based on the lower cost of serving them. While the maximum SLCs for residential and single line business customers are lower than the maximum SLCs for multiline business customers, this difference in the rate cap is not based on cost differences.[41] This approach also includes the cost of the line cards in developing the cost relationship between ISDN connections and non-ISDN connections even though line cards are treated as switching, not local loop facilities for jurisdictional separations and Part 69 cost allocation

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[40] The need to obtain and analyze cost data may represent a drawback to this approach.

[41] For an explanation of how SLCs are calculated see para. 8 supra.

purposes. In light of the additional local switching costs incurred to provide ISDN, however, additional cost recovery, even if accomplished through a different rate element, may be reasonable.

30. Reducing SLCs for derived channel connections to 50 percent of the level required by the current rules is another intermediate option between the per-facility and per-derived channel approaches. Under this approach, the LECs would charge one SLC for every two derived channels.[42] Like the previous option, this approach would foster the growth of derived channel services to a greater extent than applying a SLC to each derived channel. This option would also raise substantially less concern about increasing interstate toll rates than the per-facility approach. It is also more consistent with the long term need to reduce the support flows intrinsic to the current CCL charge in light of increasing competition.

4. The Per-Derived Channel Approach

31. The existing rules require that the LECs charge a SLC for each derived channel in the case of ISDN and other similar services. Absent other off-setting changes, this approach increases the customer's total price for ISDN, and will tend to reduce demand for such services. On the other hand, this approach would not have the potential to increase CCL charges and interstate toll rates since it would not tend to reduce SLC revenues. In fact, applying a SLC to each derived channel could potentially increase current SLC revenues and reduce support flows intrinsic to the CCL charge[42] even as areas of competition are developing in the interstate access market.

5. Additional Options

32. There are also several other options that focus on the issue of SLCs for ISDN and other derived channel services in a changing interstate access market. As previously discussed, these developments in the marketplace exert increasing pressure on existing support flows, such as those intrinsic to the current per minute CCL charge used to recover NTS local loop costs. As a result, these options would combine reductions in the number of SLCs that our current rules would impose on derived channel services with measures to ensure that this does not increase per minute CCL charges.

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[42] This could also be done by applying 50 percent of the otherwise applicable SLC charge to each derived channel.

[42] See, paras. 18 & 20 supra.

33. One such option would be to permit the LECs to impose a reduced number of SLCs for derived channel services, accompanied by a small increase in SLC rates. For example, the current caps on SLCs could be increased by $.25 per month for all subscribers. This approach would encourage the development of ISDN and other derived channel services by reducing cost recovery from derived channel services. At the same time, it would lessen or prevent any potential reduction in SLC revenues that could lead to higher interstate toll rates.

34. A second approach that would prevent adverse consequences from a potential reduction in multiline business SLC revenues would be to permit, but not require, the LECs to apply fewer SLCs for derived channel services than the current rules require, but to adjust the price caps rules to prevent this from leading to an increase in CCL rates. This approach would permit the LECs to lower SLCs for derived channel services in order to encourage their development, but would prevent a reduction in SLC revenues from causing an increase in CCL charges and putting upward pressure on interstate toll rates.

6. Request for Comments

35. We ask interested parties to comment on the analytical framework and options for defining the SLCs that subscribers to ISDN and other derived channel services must pay. We also seek comment on our analysis of the various options described in this Notice. Commenting parties are urged to suggest additional or different policy goals as part of the analytical framework for evaluating options as well as to present additional options for the Commission's consideration. We also seek comment on whether any new rules for the application of SLCs for ISDN and similar derived channel services should apply to all local loops provisioned by the telephone company through the use of derived channel technology, regardless of whether the use of derived channel technology in the provisioning of the loop is apparent to the subscriber or not.[43]

36. In addition, we note that it would be helpful if interested parties provide us with specific information concerning the perceived elasticity of demand for ISDN services, the various ISDN service options available in the marketplace, the total intrastate charges for each of these service options, as well as the advantages and disadvantages of alternative service and equipment configurations that offer communications capabilities comparable to those of ISDN. Moreover, certain of the options for applying SLCs under our Part 69 access charge rules described above would use a definition of the term "line"

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[43] See para. 5 supra.

that differs from the current separations definition in Part 36.[44] We seek comment on whether we should initiate the process of considering conforming separations changes through a referral to a Joint Board in the event that we adopt such an approach. In light of competitive developments in the interstate access market, interested parties may also wish to take this opportunity to comment more generally on the need for additional changes to the way carriers can recover the interstate assignment of local loop costs and local switching or other other costs that the parties view as NTS.

IV. Ex Parte Presentations

37. This proceeding is a non-restricted notice and comment rulemaking. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules.[45]

V. Regulatory Flexibility Analysis

38. We certify that the Regulatory Flexibility Act[46] is not applicable to the rule changes we are proposing in this proceeding. If the proposed rule changes are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The LECs are not small entities as defined by the Act because, even with increased competition, they remain dominant in their service areas. Since only the LECs are directly subject to the proposals herein, the Commission is not required to apply the formal procedures set forth in the Regulatory Flexibility Act. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. S 601, et seq.

V. Comment Filing Dates

39. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. SS 1.415 & 1.419, interested parties may file comments with the Office of

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[44] See para. 11 supra.

[45] See generally, Sections 1.1202, 1.1203 and 1.1206(a) of the Commission's rules, 47 C.F.R. §§ 1.1202, 1.1203 & 1.1206(a).

[46] 5 U.S.C. §§ 601-12.

the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before June 29, 1995, and reply comments on or before July 14, 1995. To file formally in this proceeding, participants must file an original and four copies of all comments, replies, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. In addition, parties are to provide a copy of any filings in this proceeding to Peggy Reitzel of the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554. Parties are also to file one copy of any documents in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and Reply comments will be available for public inspection during regular business hours in the FCC Reference Room (Room 239), 1919 M Street, N.W. , Washington, D.C.

V. Ordering Clauses

40. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4, and 201-205 of the Communications Actof 1934, as amended, 47 U.S.C. SS 151, 154, & 201-205, a NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED.

FEDERAL COMMUNICATION COMMISSION

William F. Caton
Acting Secretary

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